STATE OF WISCONSIN
SUPREME COURT

Docket No. 99-3263

JULIE L. RABIDEAU,

Plaintiff-Appellant-Petitioner,

v.

CITY OF RACINE,

Defendant-Respondent.

REPLY BRIEF OF PLAINTIFF-APPELLANT-PETITIONER

REVIEW OF A DECISION OF THE
WISCONSIN COURT OF APPEALS, DISTRICT II
DATED JUNE 7, 2000
Court of Appeals Case No.: 99-3263

Racine County
Judge Allan Torhorst

Respectfully submitted:

LAW OFFICES OF ALAN D. EISENBERG
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STATEMENT OF THE FACTS

The City of Racine attempts to minimize the loss Julie Rabideau sustained when Officer Thomas Jacobi killed her dog or otherwise justify his actions by setting forth numerous allegations that the dog had a history of aggression and was acting aggressively on the date in question. The City also addresses a discovery dispute which arose during the deposition of Rabideau which, if resolved favorably to the City, would presumably have supported the idea that Rabideau knew her dog was aggressive. All that these allegations accomplish, however, is to confirm that there was a tremendous factual dispute over exactly what occurred on the date in question. This, in turn, serves to highlight that this case was not an appropriate one for summary disposition on the City's motion. For purposes of this appeal, what is important about the City's Statement of Facts is that nowhere does it dispute that there is a version of the facts

highly favorable to Rabideau which is fully supported by the record.

ARGUMENT

I. SINCE THIS COURT HAS NEVER RULED ON THE ISSUE ACCEPTED FOR REVIEW, IT WOULD BE ESTABLISHING, NOT *CHANGING*, THE LAW.

The City contends Rabideau is asking this Court to "change" the law as it relates to recovery for emotional distress when an animal owner witnesses the negligent or intentional destruction of his or her companion dog. To Rabideau's knowledge, however, neither this Court nor any other Wisconsin court has issued a published decision addressing this issue, nor has the City cited such a case. Thus, whatever result this Court deems appropriate will not "change" existing law but rather, establish new law.

II. PUBLIC POLICY FACTORS DO NOT MITIGATE AGAINST THE RECOVERY FOR EMOTIONAL DISTRESS OF WITNESSING THE NEGLIGENT DESTRUCTION OF ONE'S COMPANION ANIMAL.

The City contends that the majority view of other jurisdictions "appears to be" that a pet owner cannot recover for emotional distress. This supposition, however, is not supported with cites to establish that an actual majority of states would reject the relief Rabideau requests. The problem is that the various decisions from other states address both negligent and intentional claims, both bystander and non-bystander claims, both emotional distress and lost sentimental value claims, and countless permutations of the same. Therefore the City just confuses the analysis when it attempts to make a blanket statement about what "a majority" of the courts have done. Even more dangerous is the City's attempt to broadly forecast how those cases engraft upon the facts of the present case.

A good example of the City's gross oversimplification is its treatment of Nichols v. Sukaro Kennels, 555 N.W.2d 689 (Iowa, 1996). The City uses Nichols to distinguish Campbell v. Animal Quarantine Station, 632 P. 2d 1066 (Hawaii, 1981), a case cited by Rabideau, because the plaintiffs in Campbell did not actually witness the tortious event. Insofar as Nichols would limit Campbell to tortious events actually witnessed, Rabideau notes that such is the essence, in Wisconsin, of the bystander claim she brought. Rabideau further notes that there are facts in this record to establish she did in fact witness the shooting of her dog and from close proximity.

The City seems to believe that if this Court were to allow human companions to recover for the emotional distress associated with witnessing the negligent or intentional destruction of his or her companion dog, the sky will fall. An examination of the public policy factors set forth in Kleinke v.

Farmers Coop. Supply & Shipping, 202 Wis. 2d 138, 549 N.W.2d 714 (1996), reveals there is no reason to believe the parade of horribles conjured up by the City will ever transpire.

First, there is no reason why such damage claims will be wholly out of proportion to the culpability of the negligent party. Rabideau is not asking this Court, as the City worries, to allow emotional distress to be recovered for all "property damage," only for companion dogs. There is no reason why a jury cannot hear evidence as to the closeness of the relationship between companion animal and owner and, after considering the degree of culpability, arrive at a just damage award, just as they do in all bystander claims. Furthermore, courts can review and adjust disproportionate damage awards. Section 805.15(6), STATS.

Second, allowing recovery for the loss of a companion dog would not unreasonably burden negligent actors. We are a

society which adheres to the belief that for every wrong there is a remedy. Article I, sec. 9, Wisconsin Constitution. There is nothing unreasonable about burdening actors with the responsibility of causing emotional distress when, through their own carelessness, they bring about the death of a companion animal in the presence of its owner. Again, the reasonableness of the burden will be secured by the collective wisdom of a jury of the actor's peers. Thereafter, should the jury fail to exercise the proper restraint, the court may intervene and ensure the reasonableness of the burden.

Third, there is no reason to believe such a holding would give rise to fraudulent claims. It would be difficult, if not impossible, to arrange for a third party to negligently kill one's dog in one's presence. Indeed, one could do the same with one's child but in both cases, the emotional bond precludes such scheming. Furthermore, a plaintiff capable of such treachery

would have difficulty demonstrating a bona fide emotional attachment to the dog and accordingly, could not prove emotional damages.

Fourth, there is no reason to believe that drawing a narrow exception for companion dogs will open the floodgates to litigation. The City fears that allowing recovery is just one step towards allowing recovery for items of personal property. Of course, the City ignores that the states which allow recovery for emotional damages of this type have neither slid down this slippery slope nor otherwise been swept away by a flood of litigation. As Hawaii, which has gone much further than this Court has been petitioned, observed:

> Since our holding in Rodrigues [ten years ago], there has been no plethora of similar cases; the fears of unlimited liability have not proved true. Rather, other states have begun to allow damages for mental distress suffered under similar circumstances.

Campbell, 632 P. 2d at 1071.

On the other side of the equation, there are pubic policy factors which strongly favor fashioning the relief Rabideau requests. The most obvious and powerful of these is the dog's unique stature among the families of this state. A companion dog has much more in common with a child than it does with a sports car, for example. A child and a companion animal are both alive, they both form part of the family and, as the City acknowledges, they both return affection. These qualities distinguish dogs from carp, lizards and snakes. Aside from the sheer unlikelihood that one would ever be in a position to witness the death of one's carp or lizard, these are not animals which engage in a mutual exchange of love, affection and loyalty, the hallmarks which give rise to genuine emotional distress. By limiting recovery to cases involving traditional household pets which move among the family, interacting with

all its members, sharing and returning affection, this Court can be assured that reptile-based claims will not proliferate.

Another problem with the City's hypothetical flood of lawsuits is that it wrongly imagines all claims would be viable if this Court grants Rabideau relief. Accordingly, it presumes that an owner who discovers his prized goldfish dead in the garden pond the day after the lawn company chemically fertilizes his garden would have a cause of action. Setting aside the fact that goldfish are incapable of returning affection (and therefore, more akin to property), this would not be a bystander claim. Bystander claims have evolved because it is presumed the very act of witnessing the death of a close companion legitimizes the emotional distress and makes fraudulent claims unlikely. In Bowen Lumbermans Mut. Cas. Co., 183 Wis. 2d 627, 656, 517 N.W.2d 432 (1994), this Court understood this important point when it stated:

> [T]he suffering that flows from beholding the agony or death of a spouse, parent, child, grandparent, grandchild or sibling is unique in human experience and such harm to a plaintiff's emotional tranquility is so serious and compelling as to warrant compensation. Limiting recovery to those plaintiffs who have the specified family relationships with the victim acknowledges the special qualitites of close family relationships, yet it places a reasonable limit on the liability of the tortfeasor.

Id. at 657. Rabideau asserts that there is a special quality of a close family relationship with the family dog and beholding its execution is unique in human experience causing obvious harm to the bystander's emotional tranquility so as to warrant compensation.

In short, this Court is not being asked to carve out some breathtaking exception which will change the very face of personal injury litigation. This case is narrowly limited to bystander claims and does not involve goldfish, reptiles or even cats; only a dog. Accordingly, this Court's opinion will accordingly be limited to the facts before it. The continuous

interaction between dog and family and the critical fact that humans' relationships with their dogs, like their relationships with their children, are "bi-directional," will place a reasonable limit on claims.

Finally, it should be remembered that none of the Kleinke factors have any application when the defendant's acts are intentional. Concerns over proportionality of damage judgments, unreasonable burdens on defendants, fraudulent claims by plaintiffs, and runaway litigation, all disappear when liability is imposed upon those who *intentionally* bring about the death of a companion animal. Insofar as Rabideau marshaled facts which, if believed, would establish that Officer Jacobi intentionally destroyed her dog, the Kleinke public policy factors would not bar recovery.[1]

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[1] The two additional public policy factors examined in Bowen also favor recovery in this case. First, the injury here was not too remote from the negligence, but rather, the proximate cause. Second, it does not appear, in

III. THE ALSTEEN FACTORS FAVOR ALLOWING A BYSTANDER CLAIM FOR THE INTENTIONAL DESTRUCTION OF ONE'S COMPANION DOG.

The City's approach with intentional acts cases mirrors that employed in its analysis of negligence cases. For example, it attempts to distinguish LaPorte v. Associated Independents, 163 So. 2d 267 (Fla. 1964), a case where recovery was allowed when a garbage collector killed a tethered miniature dachshund by throwing a garbage can at it. The City maintains LaPorte can be factually distinguished because "the conduct of the garbage collector in LaPorte is vastly different from the conduct of Officer Jacobi in the present matter." (City Brief, page 18). The problem with this argument is that it relies entirely on the City's version of the facts when the facts of this case were hotly disputed. If Rabideau's version of the facts is accepted, as it

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retrospect, extraordinary that the negligence should have brought about the harm.

must be at this stage of the case, there is very little difference between the conduct of the garbage collector in LaPorte and Officer Jacobi.

The City presumes it can decide the present issue on the basis of the four-prong test set forth in Alsteen v. Gehl, 21 Wis. 2d 349, 124 N.W.2d 312 (1963). The City analyzes the first factor under the false premise that a plaintiff can only demonstrate the defendant's conduct was intentional and to cause emotional distress if there is a history of acrimony between plaintiff and defendant. To support this argument, the City cites Gluckman v. American Airlines, 884 F. Supp. 151 (S.D.N.Y. 1994), where a dog transported in violation of airline guidelines died in an unventilated baggage compartment. When the plaintiff later learned of the dog's death and burial, he brought suit.

In citing Gluckman, the City keeps forgetting that we are only at the pleadings stage of this case and that one factual version is that Officer Jacobi executed Rabideau's dog in cold blood as she stood just a few feet away. There is an important difference when the intentional act causing emotional distress is inflicted with full knowledge that the plaintiff is present as a bystander. **As applied to this case, such circumstances mean the officer would have had to know that such an act would cause emotional distress to Rabideau and to carry out that act with that knowledge was tantamount to intentionally eliciting such an emotional reaction.** Indeed, the law holds that one intends the natural and probable consequences of one's acts. Haessly v. Germantown Mut. Ins. Co., 213 Wis. 2d 108, 118, 569 N.W.2d 804 (Ct. App. 1997). Emotional distress is the natural and probable consequence of witnessing the murder of one's companion dog.

Incredibly, the City also attempts to validate the court of appeals' holding that the second Alsteen factor was not satisfied because Officer Jacobi's conduct, even under Rabideau's version of the facts, was not outrageous. With all due respect, to fire three shots in a residential neighborhood and kill a dog simply because it is sniffing another dog (and while the victim dog's owner is just a few feet away) is conduct which, in the words of the Miller[2] case quoted by the City, is "so outrageous in character, so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society."

With regard to the fourth Alsteen factor,[3] the City maintains Rabideau did not suffer an extreme disabling response

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[2] Miller v. Pekaino, 626 A.2d 637, 640-41 (Pa. Super. 1993).

[3] The City, like the court of appeals, concedes the existence of the third Alsteen factor.

to the defendant's conduct by characterizing her collapse as "temporary discomfort." The record reveals, however, that Rabideau's emotional response was severe. Upon hearing of the dog's demise, she collapsed. Thereafter, she was taken to the hospital where she received treatment. And again, this Alsteen factor must be examined in light of the fact that this is a bystander claim which, along with the alleged outrageous conduct, can serve to authenticate a plaintiff's emotional distress.

There are two final arguments which should be addressed because in making them, the City relies upon facts outside the record. First, included in the City's appendix is a newspaper article which suggests Rabideau filed a Notice of Claim with the City seeking $250,000 in damages. The court of appeals rightfully ignored this facet of the City's argument. Aside from the impropriety of using newspaper articles containing hearsay

allegations to supplement the record, Rabideau should be commended, not attacked, for showing moderation when filing her lawsuit. Second, the City uses another newspaper article to suggest that Rottweilers are dangerous animals. To the extent the dog's disposition was a factor for consideration in this case, the only relevant inquiry would be the disposition of Rabideau's dog, not some generalization about the dog's breed culled from newspaper articles.

IV. LIBERALLY CONSTRUED, AS IT MUST BE, RABIDEAU'S COMPLAINT STATED A CAUSE OF ACTION FOR EMOTIONAL DAMAGE *AND* PROPERTY LOSS AND WAS NOT FRIVOLOUS.

The City contends that Rabideau's complaint cannot be read to state a claim for the lost value of her dog. The City reaches this conclusion by pointing to the absence of statements in the complaint clearly setting forth duty, breach, causation and damages. If the City's point is that Rabideau's complaint cannot survive a strict construction, Rabideau would agree.

However, it should not be forgotten that we are dealing with a small claims complaint which begs a more informal statement of the facts underlying a claim. Moreover, the complaint is to be liberally, not literally, construed at this stage of the proceedings. Furthermore, Rabideau did set forth facts which did not require much construction to establish that she lost her dog and as the City points out, the record contains

evidence of a value attached to that dog (i.e., $200). It strikes Rabideau as very disingenuous that the City could argue that her emotional distress claims cannot survive because it is so well established in Wisconsin that a dog is "property" but then refuse to read that supposedly well-established proposition into her complaint. If Rabideau were absolutely barred from recovering any emotional damages because pleading the destruction of a dog is tantamount to pleading the destruction of property, the trial court should have so construed the complaint and limited Rabideau to recovering the $200 cost of the dog, rather than throwing out her action entirely.

The City also argues that under section 814.025, a complaint can be bifurcated with some claims being held frivolous while others are not. Thus, the City contends, even if Rabideau's claim for property loss was legitimate, her claim for emotional distress could still be frivolous. Aside from the fact

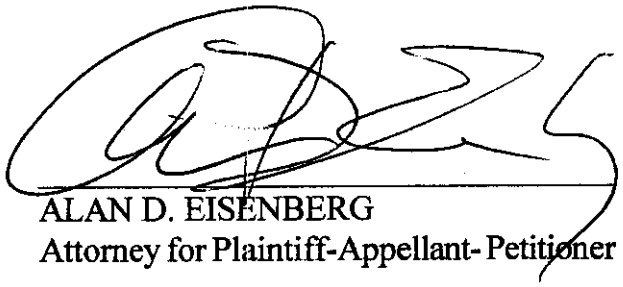
the City cites no authority for such a determination under section 814.025, the trial court never made such a bifurcated holding.

It is precisely for this reason the City is wrong to take issue with Rabideau's analysis of the trial court's reliance on section 174.01, STATS. in dismissing the underlying action. While the City correctly points out that the privilege, or lack thereof, to destroy Rabideau's dog under section 174.01 is not an issue before this Court, that does not mean the trial court's reliance on that section is irrelevant to this appeal. On the contrary, the trial court's reliance on that section reveals its flawed analysis and undercuts the City's argument that when reviewing frivolousness, deference should be paid to the trial court's decision.

Moreover, it is clear the trial court did not properly defer to Rabideau's version of the facts when addressing this case.

Had it done so, it could not have concluded the claims were frivolous. Moreover, it is likely that this Court's acceptance of the Petition for Review signals that at a minimum, Rabideau sets forth a good faith argument for an extension, modification or reversal of existing law as it relates to claims for emotional distress.

Dated this 19th day of December, 2000.



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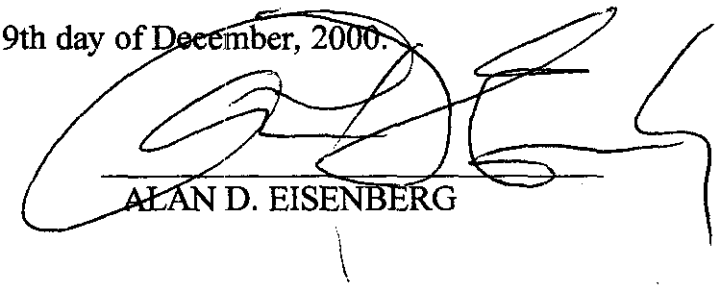
CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced using a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, minimum 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text.; double-spaced. The length of this brief is 2992 words.

Dated this 19th day of December, 2000.



ALAN D. EISENBERG

APPENDIX

COURT OF APPEALS
DECISION
DATED AND FILED

June 7, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the *bound volume of the Official Reports.*

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

No. 99-3263

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

JULIE L. RABIDEAU,

PLAINTIFF-APPELLANT,

V.

CITY OF RACINE,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Racine County: ALLAN B. TORHORST, Judge. *Affirmed.*

¶1 BROWN, P.J.[1] In this case, Julie L. Rabideau filed a small claims complaint alleging that Officer Thomas Jacobi shot and killed her dog causing her to collapse and seek medical treatment. The complaint was filed against Jacobi's

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

employer, the City of Racine. The trial court dismissed the case, finding that pursuant to WIS. STAT. § 174.01, Jacobi was privileged to shoot Rabideau's dog. The trial court also found that Rabideau failed to state a claim because she could recover no damages for negligent infliction of emotional distress or loss of the property value of her dog. The trial court also sanctioned Rabideau's attorney for bringing a frivolous claim.

¶2 Rabideau argues on appeal that the trial court improperly dismissed this case and also erred in finding the claim to be frivolous. We hold that dismissal was proper because Rabideau could recover no damages for negligent infliction of emotional distress, intentional infliction of emotional distress or loss of the property value of her dog. We also hold that the trial court properly sanctioned Rabideau's attorney for bringing a frivolous claim. Finally, we hold that bringing this appeal was not frivolous for reasons stated later.

¶3 Some of the facts of this case are undisputed while other facts are disputed. The undisputed facts are that Jacobi and Rabideau were neighbors, who were not well acquainted prior to this incident. On March 31, 1999, Rabideau personally observed Jacobi shoot her dog. Two days later, on April 2, upon being informed that her dog died, Rabideau collapsed and sought medical treatment.

¶4 The rest of the facts are disputed. Most of the dispute centers around the facts relating to the shooting. The City's explanation is that Rabideau's dog came onto Jacobi's property and attacked Jacobi's dog. Jacobi, fearing for the safety of his dog, and his wife and child, who were standing nearby, shot at Rabideau's dog and missed. Rabideau's dog continued attacking, so Jacobi fired a second shot and missed. Rabideau's dog retreated into the street but then turned

and began snarling. Jacobi thought Rabideau's dog was getting ready to charge Jacobi, his dog or his family. Jacobi then shot at and killed Rabideau's dog.

¶5 Rabideau's version of why Jacobi shot her dog is different. According to Rabideau, her dog never attacked Jacobi's dog. Rather, her dog was sniffing Jacobi's dog on the grassy area between the sidewalk and the curb in front of Jacobi's house. Rabideau called to her dog and approached it to retrieve it, and Jacobi shot at her dog and missed. Immediately, Jacobi shot again and hit Rabideau's dog. As Rabideau's dog tried to crawl away, Jacobi fired a third shot and missed.

¶6 The small claims complaint alleged the following: "City of Racine Police Officer Thomas Jacobi shot and killed my dog, Dakota, and caused me to collapse and require medical attention." The City filed a motion to dismiss for failure to state a claim upon which relief could be granted. During the hearing, the trial court considered matters outside the pleadings—namely, the affidavits and depositions of the parties. The law is that a motion to dismiss shall be treated as a motion for summary judgment when the trial court considers matters outside the pleadings. *See* WIS. STAT. § 802.06(3). Therefore, we treat this case as a review of a summary judgment.

¶7 We review the trial court's decision to grant summary judgment de novo. *See* ***Barillari v. City of Milwaukee***, 194 Wis. 2d 247, 256, 533 N.W.2d 759 (1995). First, during summary judgment the pleadings are examined to determine whether they state a claim for relief. *See* ***Transportation Ins. Co. v. Hunzinger Constr. Co.***, 179 Wis. 2d 281, 289, 507 N.W.2d 136 (Ct. App. 1993). If so, the court must then examine the evidentiary record to determine whether there is a

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genuine issue as to any material fact, and, if not, whether a party is entitled to judgment as a matter of law. *See id.*

¶8 We hold that the trial court properly granted summary judgment on Rabideau's claim for the lost property value of her dog because, after examining the pleadings, it is clear Rabideau did not seek damages for loss of property. Wisconsin adheres to a "notice-pleading" philosophy. *See* ***Midway Motor Lodge v. Hartford Ins. Group***, 226 Wis. 2d 23, 34-35, 593 N.W.2d 852 (Ct. App.), *review denied*, ___ Wis. 2d ___, 602 N.W.2d 759 (Wis. Aug. 24, 1999) (No. 98-0615). "Yet, if 'notice pleading' is to have any efficacy at all, the complaint must give the defendant fair notice of not only the plaintiff's claim but 'the grounds upon which it rests' as well." *Id.* at 35. "[I]t is not enough to indicate merely that the plaintiff has a grievance, but sufficient detail must be given so that the defendant, and the court, can obtain a fair idea of what the plaintiff is complaining, and can see that there is some basis for recovery." ***Hlavinka v. Blunt, Ellis & Loewi, Inc.***, 174 Wis. 2d 381, 403-04, 497 N.W.2d 756 (Ct. App. 1993) (citations omitted). The way this is done is by setting forth an allegation covering each element of the claim for relief. *See* ***Midway Motor Lodge***, 226 Wis. 2d at 35.

¶9 In her complaint, Rabideau did not state in any way that she was seeking damages for the lost property value of her dog. Giving Rabideau's complaint a liberal reading, as we must, it does plead all four elements of a tort. But that tort is not one alleging property loss. Instead, it is a claim for personal injuries. This can be gleaned by the fact that the only "actual damages" she pleads are damages to herself, not damages for the lost property value of her dog. Her complaint states, "City of Racine Police Officer Thomas Jacobi shot and killed my dog, Dakota, and caused *me* to collapse and require medical attention." (Emphasis

added.) Rabideau, for instance, does not state in her complaint that because Jacobi shot her dog, she collapsed, required medical attention and *lost the property value of her dog*. Because Rabideau has not pled the lost property value of her dog as part of her "actual damages," we cannot and will not construe her complaint as one for damage to property by the tortious action of another.

¶10 We hold that the trial court also properly granted summary judgment on Rabideau's claim for emotional distress.[2] While there is a factual dispute regarding why Jacobi shot Rabideau's dog, none of these disputed facts are material to whether Rabideau has a claim for emotional distress. Even under Rabideau's view of the facts of this case, as a matter of law, she still cannot state a claim for either negligent or intentional infliction of emotional distress.

¶11 "[A]ny plaintiff claiming negligent infliction of emotional distress, including a bystander, must prove three elements, that the: (1) defendant's conduct fell below the applicable standard of care; (2) plaintiff suffered an injury; and (3) defendant's conduct was a cause-in-fact of the plaintiff's injury." ***Rosin v. Fort Howard Corp.***, 222 Wis. 2d 365, 368, 588 N.W.2d 58 (Ct. App.), *review denied*, 222 Wis. 2d 676, 589 N.W.2d 630 (Wis. Dec. 15 1998) (No. 98-0861). Negligent infliction of emotional distress has historically raised two concerns: that claims are genuine and that the financial burden placed on the defendant is fair. *See **id.*** at 369. Three critical factors help guarantee that the claim is genuine and that allowing recovery will not unreasonably burden the defendant or contravene other public policy considerations. *See **id.***

[2] While the trial court only discussed Rabideau's failure to state a claim for negligent infliction of emotional distress, Rabideau mentions intentional infliction of emotional distress in her brief. We discuss both claims.

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> First, the injury the victim suffered must have been fatal or severe. Second, the victim and the bystander-plaintiff must be related as spouses, parent-child, grandparent-grandchild, or siblings. Third, the bystander-plaintiff must have "observed an extraordinary event, namely the incident and injury or the scene soon after the incident with the injured victim at the scene."

Id. at 369-70 (citation omitted). Also, the Wisconsin Supreme Court has held that "it is unlikely that a plaintiff could ever recover for the emotional distress caused by negligent damage to his or her property." ***Kleinke v. Farmers Coop. Supply & Shipping***, 202 Wis. 2d 138, 145, 549 N.W.2d 714 (1996).

¶12 Rabideau's claim for negligent infliction of emotional distress fails as a matter of law for two reasons. First, Rabideau and her dog were not related as spouses, parent-child, grandparent-grandchild, or siblings. Second, Rabideau's dog is property, and the Wisconsin Supreme Court has held that recovery for negligent infliction of emotional distress due to property loss is unlikely. *See id.* 145.

¶13 We also hold that Rabideau's claim cannot survive summary judgment on the basis that the complaint, liberally read, states a claim for intentional infliction of emotional distress. A plaintiff may recover for intentional infliction of emotional distress if four factors are established. *See* ***Alsteen v. Gehl***, 21 Wis. 2d 349, 359, 124 N.W.2d 312 (1963). First, the plaintiff must demonstrate that the defendant's conduct was intentional. *See id.* Second, the plaintiff must prove that the defendant's conduct was extreme and outrageous. *See id.* Third, the plaintiff must demonstrate that the defendant's conduct was the cause-in-fact of the plaintiff's injury. *See id.* at 360. Finally, the plaintiff must show that he or she suffered an extreme disabling emotional response to the defendant's conduct. *See id.* Specifically, "[t]he plaintiff must demonstrate that he [or she] was unable to function in his [or her] other relationships because of the

emotional distress caused by defendant's conduct. Temporary discomfort cannot be the basis of recovery." *Id.* at 360-61.

¶14 Rabideau fails to state a claim for intentional infliction of emotional distress because three of the four elements are not met. First, there is no evidence that Jacobi intended to harm Rabideau. Under Rabideau's view of the facts, Jacobi intended to harm Rabideau's dog. However, it does not necessarily follow that Jacobi intended to harm Rabideau by intending to harm her dog. Testimony of both parties indicates they were not well acquainted prior to the shooting. For this reason, no evidence exists that Jacobi had any motive to kill Rabideau's dog as a means of harming Rabideau.

¶15 Second, in this case Jacobi did not act extremely or outrageously by shooting Rabideau's dog. We must assume that Rabideau's version of the facts is true and that Rabideau's dog was merely sniffing Jacobi's dog. This being so, Jacobi's act of shooting Rabideau's dog was unreasonable, but not extreme or outrageous. At the time of the shooting, Rabideau had failed to control her dog by keeping it on her property and away from Jacobi's dog. Jacobi had some legitimate interest in preventing an uncontrolled dog from harming his dog, even if—taking the facts in a light most favorable to Rabideau—his reaction was unreasonable.

¶16 Third, Rabideau's claim fails because there is no evidence that Rabideau suffered "an extreme disabling emotional response" and was "unable to function in [her] other relationships because of the emotional distress." *Id.* at 360. Rabideau's injuries were temporary. She passed out, went to the hospital and was treated and released without an overnight stay. There is no evidence that Rabideau's injuries, beyond causing her to initially pass out, made her unable to

function in her relationships. Because Rabideau failed to meet three of the four elements of a claim for intentional infliction of emotional distress, no valid claim for intentional infliction of emotional distress exists.

¶17 The trial court held that Rabideau's claims were frivolous. *See* WIS. STAT. § 814.025(3)(b). Whether a claim is frivolous is a question of law which we review de novo. *See* ***Lamb v. Manning***, 145 Wis. 2d 619, 628, 427 N.W.2d 437 (Ct. App. 1988). "A frivolous claim is one that is asserted by an attorney who knows or should have known the position was without a reasonable basis in law or equity and unsupported by any reasonable argument for extension or modification of existing law." ***Associates Fin. Servs. Co. v. Hornik***, 114 Wis. 2d 163, 174-75, 336 N.W.2d 395 (Ct. App. 1983). We affirm the trial court's finding that Rabideau's claims were frivolous.

¶18 Rabideau should have known that her claims for property loss and both negligent and intentional infliction of emotional distress were not supported by existing law. As discussed previously, existing pleadings law requires that a plaintiff plead a cause of action in sufficient detail, which Rabideau failed to do regarding her claim for property loss. Rabideau also failed to allege facts to support all the elements of a claim for either negligent or intentional infliction of emotional distress. Not only did Rabideau state claims which she should have known were not supported by existing law, she also made no reasonable argument to the trial court why that court should extend, modify or reverse the existing law.

¶19 The City asks that we hold this appeal to be frivolous. We refuse to do so. It is true that much of Rabideau's appeal is frivolous. The arguments about loss of property damage, negligent infliction of emotional distress and the intentional infliction of emotional distress are just as frivolous on appeal as they

were in the trial court. But one other argument of Rabideau's is not only not frivolous, it is correct. And the City's response to that argument is completely without merit.

¶20 This argument by Rabideau is that the trial court improperly made findings of fact in a summary judgment proceeding. It is unquestionably the law in Wisconsin that, in deciding whether to grant summary judgment, the trial court does not decide issues of credibility or weigh the evidence. *See* ***Fortier v. Flambeau Plastics Co.***, 164 Wis. 2d 639, 665, 476 N.W.2d 593 (Ct. App. 1991). Yet, in spite of this clear law, the City cavalierly asserted in its brief that the trial court not only found facts and weighed the credibility of the opposing affidavits and depositions before it, but that it properly did so.

¶21 This is simply not the law in Wisconsin. "The summary judgment procedure is not a trial on affidavits." ***Nelson v. Albrechtson***, 93 Wis. 2d 552, 556, 287 N.W.2d 811 (1980) (citation omitted). The City's failure to acknowledge this clear tenet of the law is nearly a frivolous act in and of itself.

¶22 When determining whether Jacobi was privileged to shoot Rabideau's dog under WIS. STAT. § 174.01, the trial court improperly found facts and weighed the credibility of the witnesses—witnesses that it never saw. The court stated that the facts of this case were "substantially undisputed," but then found the facts as claimed in Jacobi's affidavit and deposition to be the true facts. However, the affidavits and depositions of the parties clearly indicate that material facts pertaining to this statute were disputed. The trial court chose the version of

material facts most favorable to the City, which is improper during summary judgment.[3]

¶23 We recognize that this improper use of summary judgment procedure is moot because the trial court still properly granted summary judgment. Even if the finder of fact concluded that the City was not privileged under WIS. STAT. § 174.01, Rabideau could recover no damages pursuant to her complaint. However, we hold that this appeal is not frivolous in light of the fact that there was a legal basis for challenging the trial court's summary judgment procedure coupled with the City's adamant insistence that the trial court's action was proper. Since both briefs contain material clearly at odds with the law, both briefs are—in some fashion—frivolous. This court therefore refuses to find Rabideau's appeal to be frivolous. Despite our holding regarding this last issue, we will still allow the City to assess costs for this appeal.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

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[3] The trial court's decision stated the following:

> The Plaintiff's dog was shot by Thomas Jacobi, while he was acting as a police officer. The Plaintiff's dog was attacking Jacobi's dog in the presence and immediately adjacent to Jacobi, Rebecca Jacobi, his wife, and their child. The facts from the affidavits and deposition testimony, viewed most favorably to the Plaintiff, unequivocally establish that immediate action was necessary in order for Jacobi to protect himself and his family and the Jacobi's dog. The Plaintiff's dog was attacking without any restraint being offered by the Plaintiff; there is no evidence of any meaningful restraint by the Plaintiff concerning her dog.

App. p. 110

10/15/99 RECEIVED OCT 15 1999

STATE OF WISCONSIN CIRCUIT COURT RACINE COUNT

JULIE RABIDEAU

Plaintiff,

-vs- Case No. 99-SC-3859

CITY OF RACINE,

Defendant.

CIVIL COURT
FILED

OCT 14 1999

CLERK OF CIRCUIT COURT
RACINE COUNTY

DECISION

By motion and notice of motion filed 31 August 1999, the Defendant moves to have the above matter dismissed. The Defendant's brief in support of its motion to dismiss was received on the 31st. On 29 September the Plaintiff filed a response to the Defendant's motion to dismiss. On 30 September the Defendant submitted a memorandum of law to strike the Plaintiff's responsive brief and affidavit; this request was withdrawn at the hearing. On 1 October the Plaintiff responded to the Defendant's motion to strike its brief and affidavit.

The motion was set for hearing before the Court on 4 October at which time both parties appeared and following argument the Court

took the matter under advisement.

The file reflects that the Complaint was filed on 28 July 1999 alleging that...

> "On 31 March 1999 a City of Racine police officer (Thomas Jacobi) shot and killed my dog (dog of Plaintiff) Dakota, and caused me to collapse and require medical attention."

The file contains a Complaint signed by the Plaintiff, Julie L. Rabideau, and an identical Complaint signed by Paul D. Lawent, attorney for the Plaintiff, both filed on 28 July 1999. Following service on the City of Racine an Answer was filed together with an Affirmative Defense on 16 August and the motion to dismiss, set forth above, was filed on 30 August, with an amended notice filed on 31 August.

The matter was scheduled for a settlement conference on 13 October; this settlement conference was adjourned based on the immediate motion.

At the motion hearing the parties filed the depositions of Julie Rabideau, Plaintiff, taken on 1 October 1999; and the deposition of Thomas Jacobi and Rebecca Jacobi taken on 1 October 1999. The Defendant, City of Racine (City hereinafter), submits that Thomas Jacobi, a City of Racine police officer, is privileged to kill a dog without liability to himself or the City of Racine pursuant to Sec. 174.01 Stats. Chapt. 174 deals with dogs; and Sec. 174.01 (1) states as follows:

> "174.01 Restraining action against dogs.
> (1) Killing a dog. (a) except as provided

> in par. (b), a person may intentionally kill a dog only if a person is threatened with serious bodily harm by the dog and:
> 1. Other restraining actions were tried and failed; or
> 2. Immediate action is necessary.
> (b) A person may intentionally kill a dog if a domestic animal that is owned or in custody of the person is threatened with serious bodily harm by the dog and the dog is on property owned or controlled by the person and:
> 1. Other restraining actions were tried and failed; or
> 2. Immediate action is necessary.
> Inapplicable to officers, veterinarians and persons killing their own dog. This section does not apply to an officer acting in the lawful performance of his or her duties under Sec. 29.05(8)(b), 95.21, 174.02(3) or 174.046(9)..."

It appears from the facts that the exemptions given to officers named in Sec. 174.01(2) apply to this case.

The basic facts are not substantially in dispute. The Plaintiff's dog had, prior to Thomas Jacobi shooting the dog, crossed the City street/road from the Plaintiff's residence to the Jacobi residence. The Plaintiff's dog and Jacobi's dog became involved in a fight on the Jacobi property and during the fight Thomas Jacobi shot three times striking the Plaintiff's dog on the last shot. The Plaintiff's dog was on Jacobi's property when shot.

Jacobi was garbed with his police paraphernalia at the time of the shooting, however, dressed in civilian clothes and displaying his shield by a chain around his neck.

At the time of the shooting the Plaintiff was, in fact at all times during the incident, across the street upon her property. An

affidavit submitted by the Plaintiff contradicts certain details of the deposition testimony of Thomas Jacobi and Rebecca Jacobi.

The Plaintiff seeks damages for distress due to the death of her dog. The Plaintiff's dog was shot by Thomas Jacobi, while he was acting as a police officer. The Plaintiff's dog was attacking Jacobi's dog in the presence and immediately adjacent to Jacobi, Rebecca Jacobi, his wife, and their child. The facts from the affidavits and deposition testimony, viewed most favorably to the Plaintiff, unequivocally establish that immediate action was necessary in order for Jacobi to protect himself and his family and the Jacobis' dog. The Plaintiff's dog was attacking without any restraint being offered by the Plaintiff; there is no evidence of any meaningful restraint by the Plaintiff concerning her dog.

The Court is satisfied that the protection afforded a person killing a dog pursuant to Chapt. 174 is available to Thomas Jacobi and thus the City. On this basis, the matter will be dismissed.

The Court has also considered the position of the City with regard to the damages and injuries alleged by the Plaintiff as a result of being a witness to the killing event. Wisconsin law does not permit recovery for the negligent infliction of emotional distress from the damage or injuries caused or done to the Plaintiff's property. It is clear the dead dog is property. It is also clear from the depositions that the Plaintiff did not suffer any injury or damages until she learned of her dog's death on the days following the shooting. The testimony clearly establish the Plaintiff suffered no injury in

witnessing the shooting. She fainted or collapsed when advise on the following days that the dog had died and she reacted to the telephone conversation with the person advising her that her dog had died at the veterinary hospital.

The Plaintiff submits that there are facts clearly and substantially in dispute thus the matter can't be dismissed or summary judgment can't be granted. Notwithstanding certain facts are in dispute they must be facts which would allow the Plaintiff recovery under Wisconsin's law to prevent dismissal. The Court is satisfied that the Plaintiff has no basis upon which to recover damages upon the allegations set out in her complaint. The Plaintiff alleges that the shooting and killing of her dog..."caused me to collapse and require medical attention." Notwithstanding the parties' factual disputes, there is no question that the Plaintiff's claim seeks damages for emotional distress and/or the infliction of emotional distress and the law won't permit recovery even if dismissal or summary judgment weren't granted due to a dispute on the facts; there must be a legal basis to grant relief or recovery before the Court will consider whether a genuine dispute on the facts preclude a dismissal.

The Court finds that the Defendant is entitled to the protection afforded a person killing a dog pursuant to Sec. 174.01(1) Stats. and further finds that the Plaintiff is not entitled to recover for her alleged injuries as based upon the allegations in the Complaint. She seeks recovery for negligent infliction of emotional distress which did not occur as a result of the shooting and further,

the claim is based upon the loss or injury to her property and not to family member as is required for a claim of the nature she has filed.

The motion to dismiss the Complaint is granted.

The Court, upon the findings set forth above finds that the Complaint in this action is frivolous as defined in Sec. 814.052 Stats The claim for emotional distress or the intentional infliction of emotional distress is clearly one which the attorneys for the Plaintif knew or should have known was without any reasonable basis in law; and could not supported by a good faith argument for any extension, modification or reversal of existing law.

The evidence and testimony from the depositions and the affidavits on file with this court clearly establish that the injury upon which the claim is based was done to property, and not in any way to the Plaintiff or a member of her family; if such information was not known at the time the action was filed, the lack of a credible basis for emotional distress should have become apparent to the attorneys representing the Plaintiff early on during the discovery; however, the Court concludes that the investigation in this case was so simple it should have been known by the attorney filing the action.

The claim of the Plaintiff with regard to the damages she sought in this action is not actionable in Wisconsin upon the facts of this case.

The Court notes that two identical Complaints were filed in this matter at the commencement of the action; one filed by the Plaintiff and one signed and filed by the attorneys for the Plaintiff.

The Court is mindful that the several purposes and tactics of the Plaintiff in this case are interesting but beyond the interest this case may have held for the general public, it is clear the lawsuit never had any basis for action on an emotional distress claim. The Court bases its finding of frivolous action and claim under Sec. 814.025(3)(b) Stats. The attorneys for the Plaintiff shall be responsible to the Defendant for all costs and fees incurred by the Defendant.

The attorney for the Defendant shall submit to this court a bill of costs for taxing against the Plaintiff's attorneys within 10 days of the date of this decision. Upon such filing, the Plaintiff's attorneys may object to the costs as submitted for taxation and the matter will be scheduled for hearing, if requested, before the Court.

Dated this 14th day of October, 1999.

BY THE COURT:

Hon. Allan B. Torhorst

STATE OF WISCONSIN | CIRCUIT COURT | RACINE COUN

Julie L Rabideau vs City of Racine

NOTICE OF ENTRY OF JUDGMENT

Case No.: 99SC003859

11/6/99

ALAN D EISENBERG
3111 W WISCONSIN AVE.
MILWAUKEE, WI 53208-3957

A Judgment for money was entered on 11-03-1999 as follows:

In favor of (creditor):

City of Racine
730 Washington Ave
Racine, WI 53403

Creditor's attorney:

W. Scott Lewis
City Hall
730 Washington Avenue RM 201
Racine, WI 53403

Against (debtor):

Alan D Eisenberg
3111 W Wisconsin Ave.
Milwaukee, WI 53208-3957

Debtor's attorney:

Amount of Judgment	$0.00
Witness Fee	0.00
Attorney Fee	0.00
Service	0.00
Docketing Fee	0.00
Other	407.12
Filing Fee	0.00
Prejudgment Interest	0.00
Total Judgment & Costs	**$407.12**

Comments: Plaintiff's complaint dismissed pursuant to *Written Decision filed* 10/14/99

Docketing Date:

Docketing Time:

Date notice mailed:

BY THE COURT:

Circuit Court Judge/Commissioner/Clerk

Date: November 3, 1999

Note to Creditor: If the docketing fee is not paid, the judgment will not be docketed.

Notices sent to:

Court Original
W. Scott Lewis
Alan D Eisenberg

Order for Financial Disclosure and Financial Disclosure of Assets form (SC-506) sent this date to judgment debtor(s).

STATE OF WISCONSIN
SUPREME COURT

NO. 99-3263

JULIE L. RABIDEAU

Plaintiff-Appellant-Petitioner

v.

CITY OF RACINE

Defendant-Respondent

ON APPEAL FROM THE CIRCUIT COURT FOR RACINE COUNTY
THE HONORABLE ALLAN B. TORHORST, JUDGE
Case No. 99-SC-3859

BRIEF AND APPENDIX OF DEFENDANT-RESPONDENT

CITY OF RACINE
OFFICE OF THE CITY ATTORNEY
Attorneys for Defendant
Respondent

By: W. Scott Lewis
Assistant City Attorney
730 Washington Avenue
Racine WI 53403
(262) 636-9115
State Bar # 1014551

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I.

STATEMENT OF THE ISSUES

The Defendant-Respondent City of Racine (hereafter "Respondent") believes that Plaintiff-Appellant-Petitioner Julie L. Rabideau (hereafter "Appellant") misconstrues the first issue and misconstrues the rulings of the Racine circuit court and the court of appeals as to the first issue.

The Respondent would frame the issues as follows:

1. Does a cause of action lie under Wisconsin law for *negligent* infliction of emotional distress due to property loss or damage?

   The circuit court answered: no.
   The court of appeals answered: no.

2. Did the Appellant state a claim for *intentional* infliction of emotional distress?

   The circuit court did not answer.
   The court of appeals answered: no.

3. Did the Appellant's complaint state a cause of action for the loss of her dog?

   The circuit court answered: no.
   The court of appeals answered: no.

4. Was the Appellant's claim for negligent infliction of emotional distress due to property loss or damage frivolous?

   The circuit court answered: yes.
   The court of appeals answered: yes.

II.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The respondent agrees with the Appellant that the Supreme Court's acceptance of Appellant's Petition for Review indicates that the court finds this case of sufficient importance to mandate oral argument and publication.

III.

STATEMENT OF THE CASE AND FACTS

Julie Rabideau ("Appellant") owned a dog, a Rottweiler named "Dakota." Prior to March 31, 1999, the date of the shooting of Appellant's dog by Racine police officer Thomas Jacobi, Appellant's Rottweiler had twice attacked Jacobi's dog, a Chesapeake Bay Retriever named "Jed". (R. 5: 2, para. 6, R-App. 101, para.6.) Additionally, the Appellant had previously been cited for having her Rottweiler run at large on August 25, 1998 in an incident where her dog ran across the street and attacked another dog. (R. 16: 36-38; R. 9: 3-5; R-App. 141-143.) Appellant paid a forfeiture of $98.50 as a result of the citation she received. (R. 16: 14, lines 18-20; R-App. 116.) On March 31, 1999 Officer Jacobi had just returned home to his

residence located at 1200 Sheridan Drive, Racine, Wisconsin. He had worked an off-duty job and was still wearing a police badge around his neck and still had his gun on his police department issued belt. (R. 15: 11.) Jacobi's two year old daughter had drawn a picture on the front sidewalk which she wanted to show her father. (R. 14: 3-4.) As Jacobi, his wife and daughter walked to the sidewalk, Appellant's Rottweiler ran across the street and attacked Jacobi's dog. (R. 15: 7, R. 5: 2, para. 1-3, R-App. 101.) Appellant acknowledged that her dog ran across the street but contended that her dog was only "sniffing" the Jacobi dog. (R. 16: 17-18; R-App. 119-120.)

Jacobi's wife, who was pregnant, and his daughter were standing close by when appellant's dog launched its attack. (R. 5: 2, para.4, R-App. 101; R. 15: 10.) They started to scream. (R. 14: 8.) Jacobi yelled at Appellant's dog, but to no avail. (R. 15: 11.) Fearing for the safety of his dog as well as for the safety of his wife and daughter, Jacobi fired a shot at Appellant's dog. His first shot missed. (R. 5: 2, para. 7, R-App. 101; R. 15: 1-12.) Appellant's dog hesitated and then resumed its biting attack on Jacobi's dog. Jacobi then fired a second shot, which also missed. (R. 5: 3, para. 8, R-App. 102; R. 15: 12-13.)

Appellant's dog retreated into or toward the street and turned its head, snarling. Jacobi took the demeanor of Appellant's dog to mean that the Rottweiler was about to charge. (R. 5: 3, para. 9, R-App. 102; R. 15: 13.) At this point, Jacobi fired a third time, striking the Appellant's dog in the rear. (R. 15: 16; R. 5: 3, para. 10, R-App. 102.) Appellant's dog crawled or walked away into the street. (R. 15: 18-19.) During the entire time that Appellant's dog attacked the Jacobi dog, Appellant remained across the street making no attempt to intervene. (R. 5: 3, para. 11, R-App. 102; R. 14: 13.)

Appellant contended that she was standing right next to her dog during the time that the shots were fired. (R. 8: 38, para. 23, R-App. 139; R. 16: 19, R-App. 121.) She recalled that it was the second shot, not the third shot that hit her dog. (R. 16: 21, R-App. 123.) She further contended that her dog never bit Jacobi's dog (*Id.*) and, in fact, had never attacked another dog prior to March 31, 1999. (R. 16: 9, R-App. 111.) She disagreed with Jacobi that he had only fired his shots in a downward direction (R. 8: 4, para. 22; R-App. 139) yet stated that her dog did not leap in the air or lunge or pounce. (R. 16: 23, R-App.125.)

More than 48 hours after the shooting, on April 2, 1999, at about 7:15 p.m. Appellant was informed by her boyfriend that he had retrieved Appellant's dog from the veterinarian and buried the dog in the back yard of her boyfriend's mother. (R. 16: 27-28, R-App.129-130.) Appellant hyperventilated and collapsed upon hearing the news. She was taken to the hospital where she received some medical treatment and was immediately released. (R. 16: 28-29; R-App.130-131.)

Appellant filed a claim pursuant to Wis. Stat. § 893.80(1) (1997-1998) with the City of Racine ("Respondent") for $250,000. The damages sought were drastically reduced in the instant lawsuit in small claims court to $4,999. In a newspaper account appearing in the Racine *Journal Times* on July 30, 1999, Appellant's attorney said that the substantial decrease in damages sought was due to the fact that when the claim was filed, Appellant was uncertain as to the future status of her health. "It appears there will not be long-term consequences," her attorney is quoted as saying. (R. 7: 8; R-App. 137.) In the same article, Appellant's attorney alleged that the investigation into the shooting of the dog by the Racine police department and

the Racine County District Attorney's Office had resulted in "a concerted cover-up" and "the response to [Appellant] is utterly outrageous."

On July 27, 1999 Appellant filed the instant small claims action alleging that "City of Racine Police Officer Thomas Jacobi shot and killed my dog, Dakota, and caused me to collapse and require medical attention." (R. 1; R-App. 144.) On the same day, Attorney Alan Eisenberg also filed a small claims complaint on behalf of Appellant. Attorney Eisenberg's complaint made the same allegation. (R. 2; R-App. 145.)

On August 30, 1999 the Respondent moved to dismiss the instant case on the grounds that it failed to state a claim upon which relief could be granted. Wis. Stat. § 802.06(2)(a). Specifically, Respondent pointed out that Wisconsin law does not permit recovery for negligent infliction of emotional distress due to property damage. (R. 5,6,7; R-App. 146-151.) The affidavit of Thomas Jacobi was appended to the motion. (R. 5: 2-3, R-App. 101-102.) Appellant filed a response to Respondent's motion to dismiss and her own affidavit (R. 8: 3-5, R-App. 138-140) which the Respondent received on September 29, 1999. On September 30, 1999, Respondent filed a motion to strike

Appellant's responsive brief due to untimeliness or, in the alternative, a response to Appellant's brief and affidavit.

On October 1, 1999 (a few days before Respondent's motion to dismiss was to be heard) the parties took the depositions of Appellant, Thomas Jacobi, and Rebecca Jacobi (Thomas' wife). (R. 16, 15, 14.) During the deposition of Appellant, the Respondent attempted to discover Appellant's understanding of why she had received the citation for her dog running at large on August 25, 1998. (R. 16: 10-14, R.-App.112-116.) The Respondent's purpose in attempting discovery on that subject was to either impeach or clarify two averments in her affidavit (R. 8: 3-5, R-App. 138-140) that "Dakota did not have dangerous propensities" (para. 12) and that "Dakota had never attacked neighbors' dogs and children in the neighborhood, but was involved in one situation of a dog at large" (para. 14).

Further, Respondent sought impeachment or clarification on Appellant's earlier answer in her deposition that her dog had never attacked another dog prior to March 31, 1999. (R. 16: 9, lines 18-20, R-App. 111.) Incredibly, Appellant's counsel instructed Appellant not to answer the Respondent's questions,

and engaged in a pattern of activity designed to thwart Respondent's discovery efforts. (R. 16: 10-14, R-App. 112-116.) Respondent indicated that it would bring a motion to compel answers to its line of questioning pertaining to the citation. (R. 16: 12, R-App.114.)

On October 4, 1999, the circuit court heard oral argument on Respondent's motion to dismiss. At that time the Respondent *also brought its motion to compel Appellant to answer* Respondent's deposition questions and for the Respondent's costs in reconvening the deposition. The court ordered briefing on Respondent's motion to compel. Both Respondent and Appellant filed briefs on the matter. (R. 18 and 17.)

The circuit court never ruled on the Respondent's motion to compel. Instead, in a memorandum decision dated October 14, 1999, the court dismissed the Appellant's complaint on the merits. The court also, on its own motion, found the Appellant's lawsuit to be frivolous. The court ordered the Respondent to submit a bill of costs which the Appellant's attorneys would have to pay. The court also stated that the Appellant's counsel could object to the costs and a hearing could be set. (R. 19: 7, Appellant's App. 117.)

On October 18, 1999, Respondent submitted its bill of costs. (R. 20.) The Appellant never objected. Judgment against the Appellant, including $407.12 in costs was entered on November 3, 1999. (R. 21.)

Appellant filed a Notice of Appeal with the circuit court on December 16, 1999. The Notice was received and docketed in the court of appeals on December 22, 1999.

The appellate court rendered its decision on June 7, 2000 and affirmed the circuit court in all respects, including the circuit court's finding of frivolousness. Additionally, the court of appeals addressed an issue not raised before the circuit court, namely, whether Appellant stated a claim for intentional infliction of mental distress due to loss of her dog. The court of appeals ruled that - under the undisputed facts viewed in the light most favorable to the Appellant - Appellant could not maintain a claim for intentional infliction of emotional distress.

IV.

ARGUMENT

A. Standard of Review.

The standard of review to be used by an appellate court in analyzing the circuit court's conclusions of law is *de novo*. *Board*

of Regents v. Wisconsin Personnel Commission, 103 Wis. 2d 545, 551, 309 N.W. 2d 366, 369 (Ct. App. 1981). Accordingly, the supreme court reviews the finding of both the circuit court and the court of appeals (that a claim for relief cannot be stated under Wisconsin law for negligent infliction of emotional distress due to property damage) *de novo* and without deference to either court. The supreme court also applies the *de novo* standard to the court of appeals' finding that Appellant did not state a claim for property loss or intentional infliction of mental distress due to property damage.

The circuit court also found that the claim for negligent infliction of emotional distress was frivolous under Wis. Stat. § 814.025(3)(b) (1997-1998). (Appellant's Appendix 117.) A finding of frivolousness involves a mixed question of law and fact upon review. First, the circuit court's determination that the claim "is clearly one which the attorneys for the Plaintiff knew or should have known was without any reasonable basis in law; and could not [be] supported by a good faith argument for any extension, modification or reversal of existing law" (Appellant's App. 116) is reviewed under the clearly erroneous standard. Second, the supreme court reviews the ultimate conclusion of

frivolousness *de novo* "independent of the circuit court or court of appeals, benefiting from the analysis of both courts." *Jandrt ex rel Brueggeman v. Jerome Foods*, 227 Wis. 2d 531, 563, 597 N.W. 2d 744, 760 (1999).

B. The Issue of Whether or Not Officer Jacobi Was Privileged to Shoot Appellant's Dog Under Wis. Stat. § 174.01 (1997-1998) is Not Relevant to the Issues on Appeal.

At page 12 of her brief Appellant states that it is unclear whether the circuit court dismissed Appellant's claim pursuant to subsection 1 or subsection 2 of Wis. Stat. § 174.01 (1997-1998). An analysis of the distinction between the two subsections is unnecessary because the issue of whether Officer Jacobi was privileged to kill the Appellant's dog under state law is not properly before the court. The issues presented in the Petition for Review and in the Appellant's brief all involve whether the Appellant stated a claim upon which relief could be granted.

Specifically, Appellant alleges that her complaint states a cause of action for three types of tortious conduct:

1. Negligent infliction of emotional distress.
2. Intentional infliction of emotional distress.
3. Negligent destruction of Appellant's property.

Appellant's cause of action as stated in her complaint is clearly for negligent infliction of emotional distress. In fact, Respondent will concede that her complaint, at least on its face, states a claim for negligent infliction of emotional distress. Her complaint alleges that the shooting of the dog "*caused me* to collapse and require medical attention." (R. 1, R.-App. 144; emphasis added.) That is, her complaint states a claim which alleges a cause-in-fact, but does not - as will be seen - state a *legal* cause. Public policy considerations can bar recovery. *Morgan v. Pennsylvania General Insurance Co.*, 87 Wis. 2d 723, 731, 275 N.W. 2d 660 (1979).

The Respondent argued to the circuit court in its briefs (R. 7, 12) and to the court of appeals that Appellant was not seeking damages for the actual damage to her property, i.e., for the replacement value of her dog. There were two reasons for the Respondent's argument: 1) the plain wording of the complaint; 2) the damages sought. As to the latter, the damages, the original claim submitted to Respondent was for $250,000. This was later reduced to $4,999.00. Appellant's attorney indicated in an article in the Racine *Journal Times* that the reduction was "because at the time the claim was filed they were unsure what

the long term consequences on Rabideau's health would be. . . ." "It appears there will not be long - term consequences," her attorney is quoted as saying. (R. 7: 8; R-App. 137.) In her deposition, Appellant estimated the cost of her dog at $200. She also indicated that her dog did not have any special breeding or pedigree which would have enhanced its value. (R. 16: 7-8, R-App. 109-110.) The point of the foregoing is that if Appellant had been suing for property damage (the value of the dog) instead of mental or emotional distress, she would not have made a claim for $250,000 and sued for $4,999.00. The Respondent will add that if Appellant had filed a claim for $250,000 for the loss of a $200 dog or if she had sued for $4,999 for the loss of a $200 dog, such a position would only reinforce the finding of the circuit court that the case at bar was frivolous in nature.

The real issue is whether Appellant's claim for negligent infliction of emotional distress due to property damage has any basis in Wisconsin law. If it does not, as Respondent contends, there is no factual issue to be resolved. The court of appeals correctly ruled that "[e]ven if the finder of fact concluded the City was not privileged under WIS. STAT. § 174.01, Rabideau could

recover no damages pursuant to her complaint." (Para. 23; Appellant's Appendix 110.)

C. Wisconsin Law Only Provides for Recovery of Damages for Infliction of Emotional Distress When The Plaintiff Bystander Witnesses Death or Injury to a Related Family Member.

Under current Wisconsin law, a dog is considered property. *Campenni v. Walrath*, 180 Wis. 2d 549, 560, 509 N.W. 2d 725, 729 (1994). In a plaintiff bystander scenario "the victim and the plaintiff must be related as spouses, parent-child, grandparent-grandchild or siblings." *Bowen v. Lumbermens Mutual Casualty Company*, 183 Wis. 2d 627, 633, 517 N.W. 2d 432, 434-435 (1994). Additionally, the court in *Bowen* formally abandoned the "zone of danger" test. *Id.*, at 636.

The central thesis of Appellant's whole appeal is that Wisconsin should change its law and essentially rule that a dog is the functional equivalent of a close human relative. The Appellant cites a plethora of articles or studies that indicate that there can be a close bond between a pet and its owner. The Respondent does not dispute that an owner may have great affection for his or her animal and that, in some ways, a pet can return the owner's affection. What the Respondent does dispute

is that the law in Wisconsin should be changed, and the Respondent does so for the following reasons.

1. Emotional distress for plaintiff bystanders is limited to specific types of human victims.

As indicated, this court has found that the tort of negligent infliction of emotional distress shall apply only when the victim is related to the plaintiff as a spouse, parent, child, grandparent, grandchild or sibling. *Bowen*, *supra*, at 633. The court made its ruling as a matter of public policy. The court agreed

> that emotional trauma may accompany the injury or death of less intimately connected persons such as friends, acquaintances, or passersby. Nevertheless, the suffering that flows from beholding the agony or death of a spouse, parent, child, grandparent, grandchild or sibling is unique in human experience and such harm to a plaintiff's emotional tranquility is so serious and compelling as to warrant compensation. Limiting recovery to those plaintiffs who have the specified family relationships with the victim acknowledges the special qualities of close family relationships, *yet places a reasonable limit on the liability of the tortfeasor.*
>
> (*Id.*, at 657, emphasis added; footnote omitted.)

The point is that this court has limited the category of victims to a specific subset of human beings and it did so to limit runaway litigation. If the court chose to limit the type of human being that must be a victim to justify recovery, it makes little or no sense to expand the category of victims to non-human victims.

As with the human category of victims, the extension of Wisconsin law to animal victims urged by Appellant would create a legion of public policy problems. For instance, which *kind* of animal victim would be actionable? Do dogs have a higher status in the animal victim hierarchy than cats? What about pets that are not biologically classified as "animals", such as birds? And, does the case turn on the subjective amount of affection that the owner claims he or she has for the pet? For example, if an adult owner (who has little love for the dog which the owner reluctantly purchased for the owner's child) witnessed the death of the dog, does the owner have the same claim to emotional distress as the child who truly loved the dog?

2. The majority rule in other jurisdictions is that a pet owner cannot recover damages for emotional distress due to death or injury to a pet.

The Respondent is unaware of any Wisconsin cases specifically addressing whether a pet owner can recover emotional damages for the death of, or injury to, a pet. The Appellant cites no Wisconsin authority on the issue. The court of appeals correctly assumed that the rule in *Bowen* as to the category of the human victim controlled, and that this court's pronouncement in *Kleinke v. Farmers Coop. Supply & Shipping*,

202 Wis. 2d 138, 145, 549 N.W. 2d 714, 716 (1996) to the effect that "it is unlikely that a plaintiff could ever recover for the emotional distress caused by negligent damage to his or her property" was dispositive. (Para. 12, Appellant's Appendix 106.)

Perhaps the Appellant is encouraged by the "it is unlikely" language of the *Kleinke* court. For example, the Appellant contends that a pet is a unique species of property unlike various inanimate objects.

It may be instructive to examine the law in other jurisdictions where the issue has been addressed regarding loss of a pet. The majority view appears to be that a pet owner cannot recover for emotional distress. For example, the court in *Nichols v. Sukaro Kennels*, 555 N.W. 2d 689, 691 (Iowa, 1996) stated:

> Moreover, although we are mindful of the suffering an owner endures upon the death or injury of a beloved pet, we resolve to follow *the majority of jurisdictions* that do not allow recovery of damages for such mental distress.
>
> (Emphasis added.)

The *Nichols* decision also distinguished two minority jurisdiction cases that have allowed recovery for emotional distress. In distinguishing a Hawaii case, *Campbell v. Animal Quarantine Station*, 632 P. 2d 1066 (Hawaii 1981), the Iowa

court pointed out that the plaintiff must actually witness the tortious event. Similar to Wisconsin, the Iowa court noted, "under Iowa law a plaintiff could not recover for mental distress caused by witnessing a tortious event unless the plaintiff and victim were husband and wife or were related to within the second degree of consanguinity or affinity." (*Id.*)

The second distinguishable case, *LaPorte v. Associated Independents*, 163 So. 2d 267 (Fla. 1964) is also cited by Appellant. The Iowa court found *LaPorte* unpersuasive because the facts involved the malicious destruction of the dog. In *LaPorte*, a garbage collector hurled a garbage can at a *tethered miniature dachshund,* and killed it. When the plaintiff confronted the garbage collector, he laughed and left. (*Id.*) The Respondent will address the malicious or intentional "allegation" of Appellant ("allegation" in quotes because the issue was not addressed at the circuit court level) in the portion of this brief addressing the tort of intentional infliction of emotional distress. However, a quick reading of the facts as alleged in this case construed most favorably to Appellant reveals that the conduct of the garbage collector in *LaPorte* is vastly different from the conduct of Officer Jacobi in the present matter.

One law review commentator concurs with the Iowa court that Florida and Hawaii are in the minority in allowing for damages for emotional distress for the death or injury to a pet. *See* Debra Squires-Lee, *In Defense of Floyd*: *Appropriately Valuing Companion Animals in Tort*, 70 New York University Law Review 1059, 1078 (1995).

The following is a sampling of courts in the majority which hold that emotional distress damages are not recoverable for the death of a pet. In *Gluckman v. American Airlines*, 884 F. Supp. 151, 157 (S.D. N.Y. 1994), *modified on other grounds*, 1995 WL 11065 (1995), the court denied recovery for the death of a dog and observed, like the law in Wisconsin, that "[i]n cases where the emotional distress is suffered by a bystander who has witnessed injuries caused to others, recovery is limited to certain 'narrowly prescribed instances'. . . namely, where the party suffers serious, verified emotional distress as a proximate result of observing the serious injury or death of a family member." (Citations omitted.) The *Gluckman* court then cited prior New York authority involving the death of a dog for the proposition that "New York law does not permit recovery for

mental suffering and emotional disturbance as an element of damages for loss of a passenger's property." (*Id.*)

A recent Texas case, *Zeid v. Pearce*, 953 S.W. 2d 368, 369 (Tex. App. 1997) held that "one may not recover damages for pain and suffering or mental anguish for the loss of a pet" and opined that, under Texas law, "the recovery for the death of a dog is the dog's market value, if any, or some special or pecuniary value to the owner that may be ascertained by reference to the dog's usefulness or services." (*Id.*)

The opinion of the Arizona court in *Roman v. Carroll*, 621 P. 2d 307, 308 (Ariz. App. 1980) was as simple and to the point as you can get:

> The [Arizona] supreme court in Keck [v. Jackson, 593 P. 2d 668 (1979)] held that under certain circumstances a person may recover damages for negligent infliction of emotional distress caused by witnessing injury to a third person. . . . A dog, however, is personal property. . . . Damages are not recoverable for negligent infliction of emotional distress from witnessing injury to property. (Citations omitted.)

The Nebraska courts, in a very recent decision involving the death of two racehorses due to alleged veterinary malpractice, ruled that "Nebraska law has generally regarded animals as personal property. . . . This court has held that mental suffering is not a legitimate measure of damages for destruction of

personal property." *Fackler v. Genetzky*, 595 N.W. 2d 884, 891 (Neb. 1999). The court then surveyed the law on recovery of emotional distress due to the destruction of animals and concluded:

> [W]e determine that the majority approach is well reasoned and consistent with settled principles of Nebraska law. This court has clearly held that animals are personal property and that emotional damages cannot be had for the negligent destruction of personal property. *People may develop an emotional attachment to personal property, whether animals or inanimate objects with sentimental value, but the law does not recognize a right to money damages for emotional distress resulting from the negligent destruction of such property.*
>
> (Emphasis added.)

See also, Strawser v. Wright, 610 N.E. 2d 610, 612 (Ohio App. 1992) (death of Yorkshire terrier puppy) ("We sympathize with one who must endure the sense of loss which may accompany the death of a pet; however, we cannot ignore the law. . . . Ohio law simply does not permit recovery for serious emotional distress which is caused when one witnesses the negligent injury or destruction of one's property." (Citations omitted.))

Finally, and foreshadowing the Respondent's argument regarding intentional infliction of emotional distress, the New York court in *Fowler v. Town of Ticonderoga*, 516 N.Y.S. 2d 368,

370 (1987) asserted: "Regarding plaintiff's claim for damages for psychic trauma, a dog is personal property and damages may not be recovered for mental distress caused *by its malicious or negligent destruction*." (Citations omitted; emphasis added.)

3. Public policy factors preclude recovery for negligent infliction of emotional distress due to property damage, including a pet.

In *Kleinke, supra*, this court explained why public policy factors mandated that it was "unlikely" that a plaintiff could ever recover damages for alleged negligent infliction of emotional distress due to property damage or loss. As an aside, the Respondent will point out that, although the *Kleinke* case factually involved loss of a home, the home had belonged to the Kleinkes for 42 years. *Id.*, at 142. The Appellant attempts to factually distinguish *Kleinke* by indicating that there is a big difference between a house and a pet, yet the Respondent would ask: Can any court truly find that the loss of one's home of 42 years is any less emotionally traumatic than the loss of one's dog?

Kleinke listed four public policy reasons why Wisconsin will not permit damages for negligent infliction of emotional distress for loss of property. First, "emotional distress based on property

damage is the type of injury that will usually be wholly out of proportion to the culpability of the negligent party." *Id.*, at 145. The present case is a good example. Appellant deposed that her dog was worth $200, yet she filed a claim against the City for $250,000 and, when her alleged trauma was not as great as anticipated, she filed a lawsuit seeking $4,999.00.

Second, "allowing recovery would place an unreasonable burden on the negligent actors in property damage cases." *Id.* The court notes that this public policy factor is particularly applicable when the property has "some sentimental value." *Id.*, at 146. Of course, this statement by the court flies directly in the face of Appellant's rationale for drastically altering Wisconsin law. That is, Appellant is arguing that the sentimental value of a pet should be the reason to create an exception.

Third, "allowing recovery in such cases creates the possibility of future fraudulent claims" and, fourth - a corollary to the third factor, "allowing recovery in such cases would remove any logical stopping point to the tortfeasor's liability." *Id.* Appellant argues that her advocated change in Wisconsin law would not open the floodgates to fraudulent claims because "[a] court will have no more difficulty in determining whether an

attachment between humans and companion animals is genuine than it would have in determining whether any other family attachment is genuine." (Appellant's brief, p. 46.) Appellant also contends that limiting the advocated exception to companion animals serves a logical stopping point.[1]

It is for the very reason that fraudulent claims needed to be avoided and a potential tsunami of tort litigation needed to be nipped in the bud that the *Bowen* court limited emotional distress for bystanders to situations where the victim is a human being and related in a close degree to the bystander.

The Respondent asks: What, exactly, is a "companion animal"? For instance, if A negligently pollutes B's fish pond killing all of B's prized goldfish or carp, does B have a claim against A for emotional distress because a goldfish or carp - while technically not an "animal" - could be considered a pet? Will the courts have to weigh how much time the owner spends with his or her cat or dog to qualify as a "companion" animal as contrasted with a mere house pet? Or, will the courts have to

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[1] Appellant's brief at pages 40-47 is taken practically verbatim (indeed, word for word at times) from Steven Wise, *Recovery of Common Law Damages for Emotional Distress, Loss of Society, and Loss of Companionship for the Wrongful Death of a Companion Animal*, 4 Animal Law 33, 77-81 (1998).

distinguish between those pets that ostensibly "return" the owner's affection (such as dogs or cats) from pets (such as turtles, lizards, or snakes) that arguably do not "return" affection by purring or the wagging of tails?

Indeed, changing Wisconsin law to accommodate a pet exception may lead to further arguments in future cases that loss of family heirlooms or other inanimate objects of deep sentimental value should be actionable. Of course, the next step is to argue that any property damage is actionable as long as the owner can show that he or she was upset by the loss.

4. Appellant confuses cases which allow sentimental value to be factored in when assessing value of the property damaged with the separate tort of negligent infliction of emotional distress.

As Appellant correctly points out, some courts allow the sentimental value of the lost or damaged property to be factored in when computing the value of the property. These cases deal, however, not with the separate tort of infliction of emotional distress but with the value of the property itself.

The majority rule appears to be that the death of a dog is compensated by the dog's fair market value. *See* Robin Miller, Annotation, *Damages for Killing or Injuring Dog*, 61 ALR 5th 635

(1998); Squires-Lee, *supra*, *In Defense of Floyd: Appropriately Valuing Companion Animals in Tort*, 70 N.Y.U. Law Rev. 1059, 1061 (1995). ("Because companion animals are classified as property, most jurisdictions apply 'fair market value' as the measure of damages for their death." (Footnotes omitted.)); Peter Barton and Frances Hill, *How Much Will You Receive In Damages from the Negligent or Intentional Killing of Your Pet Dog or Cat?*, 34 N.Y. Law School Law Rev. 411, 412 (1989). ("Most states limit the recovery for the death of a pet cat or dog to the animal's market value at the time of death. All states which have reported cases on damages for a pet's death classify a pet as personal property, which is the underpinning for the market value approach." (Footnotes omitted.))

As an example, the Alaska high court analyzed the three standards for determining damages for loss of personal property ("fair market value"; "value of property to the owner"; and sentimental value) and selected fair market value as the standard applicable to the death of a dog. *Landers v. Municipality of Anchorage*, 915 P. 2d 614, 618 n.5 (Alaska 1996) ("The superior court correctly held that [the pet owners'] subjective estimation of [the dog's] value as a pet was not a

valid basis for compensation. Since dogs have legal status as items of personal property, courts generally limit the damage award in cases in which a dog has been wrongfully killed to the animal's market value at the time of death.")

D. Appellant Did Not State a Claim for Intentional Infliction of Emotional Distress.

The circuit court did not address the issue of intentional infliction of emotional distress, as the court of appeals noted. (Para. 10, n. 2, Appellant's Appendix 105.) The appellate court did consider the issue and properly ruled that Appellant did not state a claim for intentional infliction of emotional distress.

The court of appeals correctly held that "there is no evidence that Jacobi intended to harm Rabideau. . . [and] it does not necessarily follow that Jacobi intended to harm Rabideau by intending to harm her dog." (Para. 14, Appellant's Appendix 107.) Appellant counters that a deliberate act to kill Appellant's dog necessarily equals a deliberate act to harm Appellant's psyche.

Appellant correctly cites to *Alsteen v. Gehl*, 21 Wis. 2d 349, 124 N.W. 2d 312 (1963) and its four point test for establishing intentional infliction of emotional distress. However, Appellant

then misstates the law when she observes: "The first *Alsteen* factor, however, does not require that the act be taken with the intent of causing the specific harm which results." (Appellant's Brief, p. 49.)

The first *Alsteen* factor is that "[t]he plaintiff must show that the defendant's conduct was intentional; that is to say, the defendant behaved as he did *for the purpose of causing emotional distress for the plaintiff*." *Id.*, at 359 (emphasis added). Some states recognize the Restatement (Second) of Torts §46(1) (1965) standard for intentional infliction of emotional distress which states that the tortfeasor must "intentionally or *recklessly* cause[] severe emotional distress...." *Id.*, at 357 (emphasis added.) For example, Alaska adopts this approach. *Richardson v. Fairbanks North Star Borough*, 705 P. 2d 454, 456 (Alaska 1985). However, Wisconsin has departed from that approach and specifically rejected the "recklessly causes" language. *Alsteen*, at 357-358.

The *Alsteen* court stated:

> The Restatement of Torts [citing the 1957 tentative draft which read substantially the same as the final version] expresses the standard of liability for intentional infliction of emotional harm in these terms: "One who by extreme and outrageous conduct intentionally or recklessly causes

> severe emotional distress to another is subject to liability for such emotional distress and for bodily harm resulting from it." In the view of the reporter, the Restatement reflects decided case law.
>
> We cannot accept in full the Restatement statement of the rule. That rule incorporates two theories of liability into one doctrinal formulation. The term "intentional" implies that the defendant's course of conduct was undertaken for the purpose of imposing psychological harm upon the plaintiff. The term "recklessly" however, carries the entirely different connotation of gross negligence, so that a defendant who is not purposely attempting to impose psychological harm may still be held liable. In *Bielski v. Schulze* [16 Wis. 2d 1, 114 N.W. 2d 105 (1962)] we abandoned the concept of gross negligence as a basis of liability in this jurisdiction. Therefore, our statement of the standard for liability is as follows: *One who by extreme and outrageous conduct intentionally causes severe emotional distress to another is subject to liability for such emotional distress and for bodily harm resulting from it.*
>
> (*Id*; footnotes omitted; emphasis in original.)

Thus, it is clear - contrary to Appellant's assertion - that the law in Wisconsin is that the tortfeasor must intend to cause emotional distress to the plaintiff, not that the tortfeasor's act has the unintended consequence of causing emotional harm. *Cf., Gluckman v. American Airlines, supra*, at 158:

> In addition, under New York law the conduct [upon which the tort of intentional infliction of emotional distress is based] must be intentionally directed at the plaintiff. . . . As deplorable as it may be for American to have caused the death of an innocent animal, the court finds no allegation, and no evidence from the facts alleged, that American's conduct was directed intentionally at Gluckman [the dog's owner].
>
> (Citations omitted.)

Gluckman involved a horrific fact situation where Floyd, a golden retriever, was improperly transported in violation of the airline's guidelines and died from extreme heat exhaustion in an unventilated baggage compartment. Additionally, blood was found all over the dog's crate due to the animal's panicked efforts to escape.

What caused Appellant's emotional distress? It was caused, as the circuit court correctly pointed out, upon learning of the death and burial of her dog:

> *It is also clear from the depositions that the Plaintiff did* not suffer any injury or damages until she learned of her dog's death on the days following the shooting. The testimony clearly establish the Plaintiff suffered no injury in witnessing the shooting. She fainted or collapsed when advise [sic] on the following days that the dog had died and she reacted to the telephone conversation with the person advising her that her dog had died at the veterinary hospital.
>
> (R. 19: 4-5; Appellant's Appendix 114-115.)

Appellant deposed as follows on the circumstances surrounding her emotional collapse:

> Q So you did not seek any medical treatment because *of your witnessing your dog being shot on* March 31. Right?
>
> A No.
>
> Q And you didn't seek any medical treatment on April 1. Correct?
>
> A No.

Q The first medical treatment you sought was in the evening of April 2, 1999.

A Yes.

Q What happened on the evening of April 2, 1999, if you recall?

A My boyfriend had went to the vet and picked up Dakota and took him to his mother's house.

Q That would be Dean Jones?

A No. Kevin Spencer.

Q Okay.

A He is my boyfriend.

Q Dean Jones was the gentleman who was with you on March 31, but he is not your boyfriend.

A Yes. He is not my boyfriend.

Q Go ahead.

A Kevin Spencer, my boyfriend, unknown to me, went and picked up Dakota at the vet, brought him to his mother's house and buried him in the back yard. He called me and told me, which I went hysterical and I guess passed out.

(R. 16: 27-28; R-App. 129-130.)

Further, Appellant testified that there were no prior incidents between she and Jacobi which could explain any reason or motivation for Jacobi to have intentionally harmed her dog. Appellant maintained in her affidavit "that Affiant has sufficient information to form a belief that the shooting of Dakota was done

out of malice, spite and/or retaliation against Affiant." (R. 8: 5, para. 27; R-App.139.)

When Respondent questioned her statement in paragraph 27 of her affidavit, Appellant was forced to admit at her deposition that her averment was unfounded. First, at page 5 of her deposition (R. 16; R-App. 107) she admitted that she had known the Jacobis "exactly six months today." Her deposition was taken on October 1, 1999 – the dog shooting occurred on March 31, 1999. The significance of Appellant's answer is that she is saying that prior to the dog shooting on March 31, she didn't even know the Jacobis.

Second, she testified as follows when asked about any prior conflicts between herself and the Jacobis:

> Q Now prior to March 31, 1999, had Tom Jacobi ever threatened you personally with any physical harm?
>
> A No.
>
> Q Had Tom Jacobi ever threatened to do damage to any of your personal property, your car or anything of that nature?
>
> A Verbally threatening, no, but pointing a gun, yes.
>
> Q He pointed a gun at you prior to March 31, 1999?
>
> A Not prior.
>
> Q What I am talking about now is before the dog shooting episode.

A No.

Q Had he ever threatened to do harm to Dakota prior – My question is designed to ask you had he ever threatened Dakota prior to March 31, 1999?

A No.

Q Had you ever gotten into any sort of a quarrel with Tom Jacobi prior to March 31, 1999?

A No.

Q Had any of the Jacobi family quarreled with you or any member of your family prior to March 31, 1999?

A No.

(R. 16: 30-31; R-App. 132-133.)

The instant case is not a case of one person injuring or killing another's pet in order to deliberately cause anguish to that person, such as the bunny boiling in the movie *Fatal Attraction* or the horse-head-in-the-bed scene in the *Godfather*. If, for example, Appellant could show that Officer Jacobi had deliberately poisoned her dog and that there had been some prior incidents of hostility directed toward her or her dog by Jacobi, perhaps she might, at least arguably, have a case fulfilling the first *Alsteen* factor. Such is not the situation in the case at bar.

The second *Alsteen* factor is that the tortfeasor's conduct "must be extreme and outrageous." 21 Wis. 2d at 359. The

court of appeals properly ruled that Jacobi's shooting of Appellant's dog (assuming *arguendo* that Appellant's account was the more accurate) was unreasonable but not outrageous. It is not surprising that Appellant declares Jacobi's act to be outrageous, yet Appellant conveniently sidesteps the appellate court's observation that the Appellant was negligent in failing "to control her dog by keeping it on her property and away from Jacobi's dog." (Para. 15, Appellant's App. 107.) Outrageous conduct is such as where "[a] person who treats another as an object and deliberately manipulates, humiliates, or scorns that person, should be compelled to compensate that person for any disabling emotional response caused by the conduct." *Gianoli v. Pfleiderer*, 209 Wis. 2d 509, 524, 563 N.W. 2d 562, 567 (Ct. App. 1997), *rev. denied*, 211 Wis. 2d 530 (1997). Jacobi's act of shooting Appellant's dog was not intended to manipulate, humiliate or scorn Appellant as a person.

In *Miller v. Peraino*, 626 A. 2d 637, 640 (Pa. Super. 1993), by way of another example, a veterinarian allegedly deliberately beat the plaintiffs' Doberman to death. The court noted that the Restatement (Second) of Torts §46(2)(a), (b) (1965) only permits recovery for intentional infliction of mental distress to

third parties who are family members, regardless of bodily harm, or other persons if the distress results in bodily harm. Under Pennsylvania law, dogs are property, and recovery could not lie. Citing to another veterinary misconduct case, the court observed that the plaintiffs failed to state a cause of action because "the principal misconduct was focused upon appellants' dog, and not upon the appellants themselves." *Id.* The *Miller* court also gave this definition of "outrageous conduct" for intentional infliction of emotional distress to lie:

> The cases thus far decided have found liability only where the defendant's conduct has been extreme and outrageous. It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by malice, or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society.
>
> (*Id.*, at 640-641.)

The third *Alsteen* factor (causation) was not addressed by the court of appeals and Respondent will not address this element either. The fourth factor requires the plaintiff to show "that he suffered an extreme disabling emotional response to the defendant's conduct. . . . Temporary discomfort cannot be the

basis of recovery." *Alsteen*, at 360-361. As the appellate court correctly observed, Appellant's emotional distress was temporary and there was no evidence she was unable to function in her relationships. (Para. 16, Appellant's App. 107-108.) Her deposition testimony, quoted above, reveals that she fainted a full two days after the shooting of her dog and upon learning that her dog had been buried. She received temporary care at a nearby hospital and was released.

Interestingly, Appellant does not contest the court of appeals' finding as to the fourth *Alsteen* factor. Instead, the Appellant simply asserts that the shooting of her dog was *per se* outrageous. She cites the facts of the *LaPorte* case, 163 So. 2d 67 (1964), discussed earlier, as an example of malicious conduct that can result in damages for a dog owner's mental suffering. The court in *LaPorte* did not discuss whether damages would be assessed for negligent or intentional infliction of mental distress and did not employ the four part analysis set forth in the Restatement (Second) of Torts. Further, *LaPorte* involved a miniature dachshund on a tether, whereas the case at hand involves a Rottweiler who ran at large across the street and engaged Jacobi's dog.

This court has previously ruled that a dog, under certain circumstances, can constitute a dangerous weapon under the criminal code. *State v. Bodoh*, 226 Wis. 2d 718, 725, 595 N.W. 2d 330, 333 (1999). The dog in *Bodoh* was a Rottweiler. Appellant's dog was a Rottweiler. While the Respondent is not asserting that Rottweilers *per se* are dangerous or aggressive, the Respondent does contend that Rottweilers are an acknowledged type of dog that may be more dangerous than most. *See, e.g., Rottweiler passes pit bull as nation's deadliest dog*, Milwaukee Journal Sentinel, September 16, 2000, 2000 WL 26084154. ("Rottweilers have passed pit bulls as America's deadliest dog breed, according to a study released Friday [September 15, 2000]. The large dogs were involved in 33 fatal attacks on people between 1991 and 1998, the American Veterinary Medical Association said.")

E. The Appellant's Complaint Did Not State a Claim for Loss of Her Dog.

On page 56 of her brief, Appellant correctly recites the traditional four elements of a tort: duty, breach, causation and injury. Her complaint read: "City of Racine Police Officer

Thomas Jacobi shot and killed my dog, Dakota, and caused me to collapse and require medical attention." (R. 1.; R.-App. 144.)

What duty of care and what breach of duty does Appellant's complaint allege? The duty of care owed not to harm her dog which she alleges Jacobi breached when he shot her dog. What injury does she allege she sustained which was caused by Jacobi's breach? Medical injuries which she claims were *caused by* the shooting of her dog. Even a liberal reading of her complaint demonstrates that the injuries she sustained were her own personal injuries and not loss of her property, as the court of appeals correctly found. (Para. 9, Appellant's App. 104-105.)

Moreover, the damages demanded ($4,999.00) clearly indicate that Appellant is seeking damages for her emotional distress. Recall that she deposed that her dog had no special pedigree and was valued at $200. While the Respondent could find no specific Wisconsin case holding what the measure of damages for loss of a dog is, the Respondent believes that the better view is the majority view which holds that the measure is fair market value.

F. The Appellant's Claim for Negligent Infliction of Emotional Distress Due to Property Loss Was Frivolous.

The Appellant misapprehends why the circuit court found her complaint to be frivolous. The court's finding of frivolousness was based on Appellant's bringing a claim for emotional distress due to property loss which 1) had no reasonable basis under Wisconsin law and 2) for which Appellant did not present any good faith argument for extension, modification or reversal of existing law. (Appellant's App. 116.) The circuit court did not make a finding of frivolousness as to any claim for loss of the dog since the court did not find that a claim was made for property damage.

Appellant appears to argue that her complaint could not be found to be frivolous if the complaint stated a claim for loss of her dog. What Appellant fails to understand is that the circuit court's finding of frivolousness as to the negligent infliction of emotional distress claim stands on its own. That is, the emotional distress claim is still frivolous even if another claim was properly presented. If Appellant's complaint had stated a second legitimate cause of action, her complaint would not have

been dismissed, but that would not mean that her emotional distress claim was non-frivolous.

Wis. Stat. § 802.05 (1997-1998) (frivolousness in commencement of an action) is based on Federal Rules of Civil Procedure 11. *Jandrt*, 227 Wis. 2d at 549. In *Jandrt*, the plaintiffs alleged two separate claims: 1) common law negligence and 2) violation of the safe place statute. Citing to Rule 11, the court said that "[w]ithout regard to the adequacy of the allegation of a violation of the safe place statute, each element of the plaintiffs' common law negligence claims needed to be well-grounded in fact, *for the inclusion of one sufficient and adequately investigated claim does not permit counsel to file unsubstantiated claims as riders*." *Id.*, at 552 (emphasis added).

While the circuit court in the case at bar sanctioned Appellant's attorney under Wis. Stat. § 814.025(3)(b) (1997-1998) (frivolousness in maintaining or continuing an action), the Respondent contends that the standard under § 802.05 applies as well to § 814.025(3)(b). That is, if two separate claims are pleaded (one frivolous and one non-frivolous) the plaintiff cannot escape a finding of frivolousness on the frivolous claim by arguing that a non-frivolous claim was also pleaded and

maintained. As the *Jandrt* court observed regarding § 814.025 (1997-1998), "[o]nce a party knows or should have known that a claim is not supported by fact or law, it must dismiss or risk sanctions." *Id.*, at 563.

The circuit court noted that there were actually two identical complaints filed in the instant matter, one by Appellant (R.1, R.-App. 144) and one by Appellant's attorney[2]. (R. 2, R.-App. 145.) (Appellant's App. 112.) Accordingly, the Respondent believes that Appellant or Appellant's counsel could have been sanctioned under both Wis. Stat. §§ 802.05 and 814.025 (1997-1998). Be that as it may, Appellant had no excuse not to dismiss her claim for emotional distress. This is particularly true because Respondent clearly set forth the law in Wisconsin regarding the claiming of damages for negligent infliction of emotional distress due to property loss in its Memorandum of Law in Support of Defendant's Motion to Dismiss (R. 7, R.-App. 146-151). The

[2] On page 27 of her brief, Appellant states that "it is not surprising that when Rabideau jotted down her small claims complaint, the resultant language focused more on the emotions she experienced than what it would cost her to buy a new dog." This language is misleading, because Appellant's counsel also filed an identical complaint which Appellant's counsel signed. It is unclear whether Appellant or her counsel drafted the complaint. The Respondent would like to point out, however, that Attorney Eisenberg signed the complaint (see the state bar number cited) (R.2, R. App. 145), not Attorney Lawent, as the circuit court mistakenly stated. (Appellant's App. 112.)

Memorandum of Law was filed on August 30, 1999, only a month after the small claims complaint was filed on July 27, 1999.

Finally, Appellant asserts at page 61 of her brief that the appellate court affirmed the circuit court's finding of frivolousness without discussion. That is not true. The court of appeals discussed at length why a claim for negligent infliction of emotional distress based upon loss of property could not lie under Wisconsin law. (See Appellant's App. 105-106.)

VI.

CONCLUSION

The instant case is a small claims action and the cause of action is for negligent infliction of emotional distress due to loss of the Appellant's property (her dog). As the court of appeals correctly found, the cause of action alleged and the damages sought are for personal injury, not property damage. This is true even given a liberal reading of the complaint.

Since, under Wisconsin law, a party cannot recover for negligent infliction of emotional distress based on property damage as a matter of public policy, Appellant's claim was properly ruled frivolous by both the circuit court and the court of appeals. While the Respondent is mindful of the affection a pet

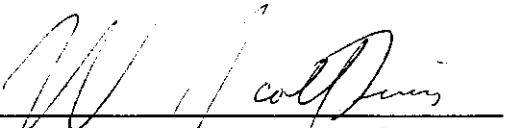
owner can have for a pet or vice versa, the court should not embark upon a radical change to Wisconsin law, as urged by Appellant.

Finally, the circuit court did not address the issue of intentional infliction of emotional distress. Instead, Appellant argued the issue to the court of appeals. The court of appeals correctly applied the material undisputed facts to the law and correctly found that Appellant did not state a claim, or have a claim, for intentional infliction of emotional distress.

The Respondent respectfully requests that the ruling of the court of appeals, including the finding of frivolousness and taxation of costs to Appellant's attorneys, be affirmed in all respects.

Dated this 4th day of December, 2000.

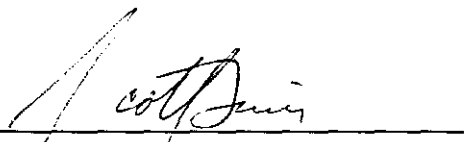
Respectfully submitted,



W. Scott Lewis, Attorney for
Defendant-Respondent City
of Racine
State Bar #1014551

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 8,500 words.



Scott Lewis, Attorney for
Defendant-Respondent City of
Racine
State Bar #1014551

/99.appeal/rabideau-sct-993263/statement-argument

APPENDIX

APPENDIX

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STATE OF WISCONSIN | CIRCUIT COURT SMALL CLAIMS | RACINE COUNTY

JULIE RABIDEAU,
Plaintiff,

v.

CITY OF RACINE,
Defendant.

Case No. 99-SC-3859
Case Type 31001

AFFIDAVIT OF THOMAS JACOBI

Thomas Jacobi, first being duly sworn on oath, hereby deposes and states as follows:

1. On March 31, 1999, affiant's canine, a Chesapeake Bay Retriever named "Jed", was attacked by a Rottweiler canine named "Dakota" which is owned by Julie Rabideau.

2. The attack occurred on or near the front yard of Affiant's residence located at 1200 Sheraton Drive, Racine, Wisconsin.

3. Affiant attempted to separate the dogs but was unsuccessful.

4. Affiant's pregnant wife and two year old daughter were standing approximately four or five feet away from "Jed" when "Dakota" attacked "Jed". Affiant's daughter was screaming in fright. Affiant feared for the safety of his wife and daughter as well as for the safety of "Jed".

5. "Dakota" weighed approximately 25 pounds more than "Jed" and "Jed" was cowering as "Dakota" tore into "Jed's" neck.

6. Affiant was personally aware of "Dakota's" dangerous propensities because "Dakota" had twice attacked "Jed" previously and Affiant was aware, based on Affiant's conversations with the neighbors, that "Dakota" had attacked other dogs and children in the neighborhood.

7. Affiant fired a gun shot at "Dakota", aiming at an angle toward the ground so as not to endanger any person in the vicinity, and missed "Dakota".

101

8. "Dakota" hesitated upon hearing the shot and then resumed the attack on "Jed" in a more violent manner. Affiant fired a second shot at "Dakota" such that the shot went down on an angle toward the ground. "Dakota" moved suddenly and the second shot also missed "Dakota".

9. "Dakota" then retreated into the street, but suddenly turned, snarling, and appeared to be ready to charge either the Affiant's dog, Affiant, Affiant's family, or any combination.

10. Affiant fired a third shot striking "Dakota". This shot was again at a downward angle.

11. "Dakota's" owner, Julie Rabideau, remained standing across the street during the entire attack by "Dakota" on "Jed" and never attempted to intervene or restrain her dog. At no time was Ms. Rabideau or any other person in the line of Affiant's fire, and at no time did Affiant point his weapon at or in the direction of Ms. Rabideau, shout at Ms. Rabideau or demonstrate any aggressive behavior toward Ms. Rabideau.

12. Affiant's shooting at and of the canine "Dakota" was based solely on his desire to defend his canine "Jed" against the vicious attack by "Dakota" against "Jed" and against potential attack by "Dakota" against his wife, daughter and himself. The shooting was not done out of malice, spite, or any other form of retaliation against Ms. Rabideau personally, or motivated in any manner by the fact that Ms. Rabideau was "Dakota's" owner.

Thomas Jacobi

Subscribed and sworn to before me
This 27th day of August, 1999.

Notary Public, Racine County, WI
My commission: 10-28-2001

STATE OF WISCONSIN CIRCUIT COURT RACINE COUNTY

JULIE RABIDEAU,

Plaintiff,

-vs-

CITY OF RACINE,

Defendant.

CASE NO. 99-SC-3859

The deposition of JULIE RABIDEAU in the above entitled action otherwise than as a witness upon the trial was taken at the instance of the defendant pursuant to Section 804.05 of the Wisconsin Statutes and acts amendatory thereof and supplementary thereto on nctice and waiver of subpoena at 730 Washington Avenue, Racine, Wisconsin, on October 1, 1999 commencing at 355 o'clock in the afternoon before SUSAN K. TAYLOR, a Notary Public in and for the State of Wisconsin.

APPEARANCES:

LAW OFFICES OF ALAN D. EISENBERG, by Alan Eisenberg and Paul D. Lawent, 3111 W. Wisconsin Avenue, Milwaukee, WI 53208-3957 appeared on behalf of the plaintiff.

Scott Lewis, Assistant City Attorney, 730 Washington Avenue, Racine, WI appeared on behalf of the defendant.

I N D E X

EXHIBIT NO.	DESCRIPTION	PAGE/LINE NO.
3	Citation	PG 10 Ln 19
4	Medical Bills	Pg 25 Ln 15

Marked Questions

Page 11, Ln 24:

Q Did Amy Johnson or Mike Rabideau tell you that your dog Dakota had run across the street and attacked another dog?

MR. EISENBERG: Objection to hearsay.

Don't answer the question.

A No.

MR. EISENBERG: Objection. Move to strike.

Do not answer the question.

MR. LEWIS: She has to answer the question.

MR. EISENBERG: No, you can seek a ruling from the court. Flagrant breach of rules of evidence. Do not ask my client for hearsay.

MR. LEWIS: I would like her to answer the question notwithstanding.

MR. EISENBERG: She did and I have moved to strike it.

MR. LEWIS: I will have to get a court order. Would you mark that question? As the attorney is fond of saying, would you mark that, please?

JULIE RABIDEAU, having been first duly sworn on oath to tell the truth, the whole truth, and nothing but the truth testified as follows:

EXAMINATION BY MR. LEWIS:

Q State your full name and spell your last name for the record.

A Julie Lynn Rabideau. R-A-B-I-D-E-A-U.

Q And how old are you, Ms. Rabideau?

A 20.

Q You have been sitting here during the depositions of Thomas Jacobi and Rebecca Jacobi. Correct?

A Yes.

MR. LEWIS: So you know that if I ask you a question, you have to answer out loud yes or no. You can't go ugh-huh or uh-ugh.

THE WITNESS: Yes.

MR. LEWIS: Can we agree if you don't understand my question, you will tell me that you don't understand the question?

THE WITNESS: Yes.

Q How old are you?

A I am --

MR. EISENBERG: You just asked that. She is 20.

A 20.

Q Where do you currently live?

A 1127 Sheraton Drive.

Q How long have you lived there?

A One year and ten months.

Q And where did you live prior to that?

A 5309 Willowview Road.

Q That is in Racine also?

A Caledonia.

Q How long did you live there?

MR. RABIDEAU: Ten years.

A Ten years.

MR. LEWIS: She has to answer the questions, sir.

MR. EISENBERG: Don't do that, Wayne.

Q Do you know Thomas Jacobi?

A Now, I do, yes.

Q How long have you known him for?

A Exactly six months today.

Q And do you know Rebecca Jacobi?

A Now, I do, yes.

Q How long have you known her?

A Exactly six months today. I have known of them.

Q Where do you currently work?

A All Saints, St. Mary's Hospital.

Q What do you do there?
A I am a certified nursing assistant.
Q What are your hours of work?
A Two 12-hour-and-a-half-hour shifts a week.
Q How many days do you work there? What are your normal days that you work there?
A They vary. Two days a week.
Q What is your educational background?
A I graduated from high school and am in my second year at college.
Q Where did you graduate from high school?
A Horlick.
Q You say you are in your second year of college?
A Yes.
Q Where do you go to college?
A University of Wisconsin - Milwaukee.
Q And have you ever been convicted of a crime?
A No.
Q You at one time owned a dog named Dakota. Is that correct?
A Yes.
Q And what kind of a dog is Dakota? What breed of dog?
A A rottweiler.
Q When did you first obtain Dakota?
A At his age of six weeks old.

Q Can you give me an approximate date when you first obtained him?
A February or March of 1996 or 1997. 1996?
Q Which one?
A 1996.
Q How much did you pay for him, or was he a gift?
A $200.
Q Was Dakota a show dog or did you take him to dog shows or anything of that nature?
A No.
Q Did he have any special pedigrees?
A I don't know what that means.
Q What I am trying to say is was he worth more than the average rottweiler would be worth because of any special breeding or anything of that nature?
A No, no special breeding.
Q Is there anything about Dakota -- and I am talking about on-the-fair-market value now -- that would have made him anymore valuable than the average rottweiler?
A He was a beautiful dog. I don't know what you mean by he would be worth more.
Q You are aware of the fact that different dogs have different pedigrees and different breedings and some dogs are worth more than other dogs because of their background. Correct? The way they have been bred.

A Yes.
Q Was there anything special about Dakota if you were to try to sell him?
A No, I don't know any of his father's or mother's background.
Q Prior to March 31, 1999, where was Dakota kept?
A As an indoor dog or a fenced in dog in the back yard.
Q He was kept inside a fenced in area behind your house?
A Yes, or indoors. Mostly indoors.
Q When you bought this house or when you moved into this house that you lived in on March 31, 1999, did the fence already exist or did you build the fence after you moved in?
A Built the fence.
Q Approximately what date did you build the fence -- or have the fence built?
A Probably March of 1998. Probably three months after we moved in.

MR. EISENBERG: Counsel, lest we be misled here, she does not own that house. It is her mother's house. She does not own the fence nor did she build it. It is her mother. It is her mother's house. Her mother built the fence. She appears not to be understanding the literal meaning of your questions.

MR. LEWIS: I will probably be

more specific.

MR. EISENBERG: I'd be remiss if I didn't explain that.

MR. LEWIS: Thank you.

Q Was the fence -- To your knowledge, did your mother have the fence built in order to keep Dakota in a confined area? Was that the purpose of the fence?

A Yes, and also to separate lawns and also the fact that my brother was a fencer.

Q What is your brother's name?

A Steven Rabideau.

Q On March 31, 1999, how many people lived at this address?

A Four.

Q Who are they?

A Faith Rabideau, my mother; Michael Rabideau, my twin brother; myself, and David Rabideau, my younger brother.

Q To your knowledge, prior to March 31, 1999, had Dakota ever attacked another dog?

A No.

Q Prior to March 31, 1999, had Dakota ever attacked a human being?

A No.

Q Prior to March 31, 1999, had Dakota ever gotten out of your yard and run around the neighborhood?

A Yes.

Q How far had he gone to, the farthest distance?

A A couple houses that I know of.

Q Half a block away?

A No, not that far.

Q Had he ever run over or crossed the street to the Jacobi property?

A Never.

Q Never prior to March 31 --

A He was always in sight.

Q He had never been on the Jacobi property ever prior to March 31, 1999?

A Never.

Q Now in your affidavit, you indicated that Dakota was involved -- I am quoting here -- quote, was involved in one situation of a dog at large. Is that correct?

A Yes

(Documents were marked as Deposition Exhibit No. 3)

Q I had a three-page document labeled as Exhibit 3 for our purposes. Do you recognize that document?

A Yes.

Q What is it?

A I recognize just this initial citation.

Q That is a copy of the citation you got on August 25 -- I believe it is -- 1998 for a dog running at large?

A Yes.

MR. LEWIS: I want you to look at the other two pages of that documentation and read it. Can you read the handwriting? Take your time and read it, please, to yourself.

Q Have you read that?

A Yes.

Q Is there anything in that documentation that you disagree with?

A I was not there.

Q So you were not a witness to that dispute.

A No.

Q So if I can refresh my recollection, if Amy Johnson -- Amy Johnson is a friend of yours?

A Question.

Q Or Mike Rabideau, that is your brother?

A Yes.

Q If they reported to Officer Schneider that your dog Dakota had run across the street and attacked a dog owned by Colleen Kuske, you would have no independent knowledge whether that was true or not. Is that correct?

A Yes.

Q Did Amy Johnson or Mike Rabideau tell you that your dog Dakota had run across the street and attacked another

dog?

MR. EISENBERG: Objection to hearsay.

Don't answer the question.

A No.

MR. EISENBERG: Objection. Move to strike.

Do not answer the question.

MR. LEWIS: She has to answer the question.

MR. EISENBERG: No, you can seek a ruling from the court. Flagrant breach of rules of evidence. Do not ask my client for hearsay.

MR. LEWIS: I would like her to answer the question notwithstanding.

MR. EISENBERG: She did and I have moved to strike it.

MR. LEWIS: I will have to get a court order.

Would you mark that question? As the attorney is fond of saying, would you mark that, please?

MR. EISENBERG: In this case, she answered the question. You have no basis for a motion. If you do, I will seek costs against you. She answered

the question before I could tell her to not answer it.

Q Can you tell us what your understanding is as to why you were issued this uniform municipal court citation for a dog running at large?

MR. EISENBERG: It is objected to. No one can know what is in the mind of another. And it calls for hearsay.

MR. LEWIS: My question is, does she have any understanding at all as to why she was issued this citation and I believe that is a permissible question and I would like her to answer it.

MR. EISENBERG: I object to it. It is not permissible. It calls for hearsay and she is incompetent to know what is in the mind of other people. She cannot have an understanding of something in somebody else's mind.

Q Did you contest this citation?

A What does contest mean?

Q Did you go to court and fight this citation?

A No.

Q Why not?

A Because I was not there.

Q I don't think you understood my question. You were just issued a citation for $98.50. Correct?

A Correct.

Q You did not go to court and fight this citation. Correct?

MR. EISENBERG: Objected to. Asked and answered.

Answer it again.

MR. LEWIS: I would like you to answer it.

A Correct.

Q Why didn't you fight the citation?

MR. EISENBERG: It is objected to. Asked and answered. Her answer was because she wasn't there. That is her answer.

MR. LEWIS: That is not responsive to my question, Counsel.

MR. EISENBERG: It certainly is. That is her answer. You asked her why and her answer was she wasn't there. It does not get any better.

Q So you didn't -- So you did not contest the ticket and you paid the $98.50 fine. Correct?

A Yes.

Q And the reason you did that is because you weren't there. That is your answer?

A Yes.

Q On the day he was shot, how much did Dakota weigh?

A About 112 pounds.

Q Are you -- or were you familiar on March 31, 1999 with Tom Jacobi's dog, Jed?

A No.

Q Had you ever seen Jed before that day?

A No.

Q Do you know what kind of a dog Jed is?

A From the statement I just heard, he is a Chesapeake Bay retriever.

Q Now you observed Dakota and Jed near each other on that date, March 31, 1999. Correct?

A I observed them sniffing each other, correct.

Q They were in close proximity to each other.

A Correct.

Q How did the size of Dakota compare to the size of Jed?

A Equal.

Q Had Jed ever attacked Dakota before March 31, 1999 to your knowledge?

A No.

Q To your knowledge, had Jed ever attacked another dog or human being prior to March 31, 1999?

A No.

Q Now I am going to ask you to explain to me in your own words what you observed on March 31, 1999. You indicated at some point, Jed and Dakota came into close proximity to each other. Correct?

A Yes.
Q How did that happen? In other words, start from the beginning. My understanding is you had pulled up in some sort of a truck to your house?
A Yes.
Q Let's take it from there. Who were you with when you pulled up in this truck to your house?
A My friend, Dean Jones, and my dog, Dakota.
Q Where was Dakota located?
A I don't know how to explain it. Behind the front seat, but in the cab of the truck. It was a pickup truck.
Q And --
A In the extended cab.
Q So Dakota was actually in the cab itself?
A Yes.
Q And Dakota left the cab or what happened?
A We pulled up in the driveway. As I was driving my friend's truck, I opened -- opened the door. I had my hands full. I got out. My friend Dean opened the door and let Dakota out his side which was right next to our side door of our house. Then I walked around to the back of the truck to go into the side of the house. As Dakota had gotten out, he saw the dog across the street which I noticed when he saw it, he had turned around, started walking toward the dog. Right then, I was

standing there and said to my friend Dean to call for Dakota.

Q Let's stop for a second. Why did you tell Dean to call Dakota as opposed to you?

A Because I had my hands full and we were just going to drop it off and --

Q So Dakota left the cab and went across the street.

A Yes.

Q To this other dog.

A Yes.

Q And this dog is the dog Jed that we were hearing about earlier.

A Yes.

Q And that dog belongs to Tom and Rebecca Jacobi. Is that right?

A Yes.

Q You told Dean to call out for the dog.

A Yes.

Q And you didn't call out for the dog because your hands were full of groceries.

A Yes. I was going to walk in the house and drop them off, come back outside.

Q What happened next?

A Dean called for Dakota, but stood there in shock with his face -- he looked so scared. So I turned my head

and looked at Dakota which was sniffing this dog, could not figure out why my friend looked so scared.

Q Let's freeze frame it for a second. At this point, where is Dakota located?

A On the grassy area between the sidewalk and the curb right by a tree.

Q And this is across the street from your house.

A Yes.

Q And that is in front of the Jacobi house. Is that correct?

A Yes.

Q What happened next?

A I called -- I told Dean to call for Dakota, which he did. He looked scared. I turned my head to figure out why he looked so scared, couldn't figure it out, so I put things down on the pickup truck. The cab had a cover over it. I put it down, walked across the street still trying to figure out why he looked so scared. I couldn't figure it out --

Q Who is looking scared now? Dean?

A Yes. My friend looked scared.

Q Where is Dean standing at this point or where is he located?

A In the driveway -- in my driveway.

Q So he is across the street from the two dogs.

A Yes.

Q And then you walked across the street from your side of the block to the front of the Jacobi house.

A No. I walked across the street into the street where at that time, as I am walking, I am calling my dog who -- who is looking at me the whole time, stepped off the curb and looked at me.

Q Your dog stepped off the curb into the street?

A Yes, where I was standing.

Q How far away from your dog are you at this point?

A About three feet.

Q What happened next?

A I heard a first shot. Then I realized why my friend obviously looked so scared.

Q Where did the shot come from?

A Jacobi's gun.

Q Where was Jacobi standing?

A In the grassy area closest to the curb just off --

Q When you say grassy area, you mean the grassy area between the sidewalk and the street?

A Yes.

Q And what happened next?

A After the first shot, I immediately started screaming, which I was frozen, stood there. My dog stood in the same position as did Jacobi -- Tom Jacobi.

Q Did you see Rebecca Jacobi or Vivian Jacobi, their daughter, at any time?

A They were on the sidewalk.

Q How far were they from Dakota at this point?

A Dakota was in the street, Rebecca and Vivian were on the sidewalk, so --

Q A street can be a large area, but I mean --

A 12 feet? I don't know.

Q So there was Dean standing outside, there was you standing outside when the first shot was fired.

A Yes.

Q Tom Jacobi was standing outside.

A Yes.

Q Rebecca and Vivian was standing there. Was anybody else standing around at this time that you observed?

A Two neighbor children were playing in the front yard of my -- next-door neighbor's front yard, two neighbor children.

Q What is the name of your neighbor?

A It was Ingrid and John Schultz (phonetic).

Q They don't live there anymore?

A No.

Q Did you see Ingrid Schultz at that time outside?

A No.

Q So then there were the two children there playing in the

front yard -- I believe you said in Ingrid Schultz' yard. Correct?

A Yes.

Q Was there anybody else outside that you observed when the first shot was fired?

A No.

Q Then what happened?

A He immediately fired again as I am screaming why, no, which hit Dakota from behind.

Q So the second shot was the shot that hit Dakota.

A Exactly.

Q Where was the dog Jed owned by the Jacobis at this point?

A Behind Tom Jacobi near the tree still. Near the tree in the grassy area between the sidewalk and the curb.

Q Now at any time before or about the time that the first shot was fired and the second shot was fired, did you see Jed and Dakota fighting or biting each other?

A Never.

Q So it is your testimony that Dakota never bit Jed.

A Yes.

Q And to your recollection, Jed never bit Dakota.

A Yes.

Q And it is your recollection that Dakota and Jed were never engaging in any aggressive behavior toward each

other.

A Never.

Q So now the second shot strikes Dakota. Correct?

A Yes.

Q How far away is Tom Jacobi from your dog at this point, if you recall?

A Six feet?

Q Is that your answer? It sounded like you were asking me.

A I don't know. Six feet.

Q How far away were you from Dakota at this point?

A About three feet.

Q Where was Dakota located at this point?

A In the street.

Q When you say in the street, was he near the curb on the Jacobi side of the street or was he in the middle of the street?

A He was facing my house in the street just off where the driveway and the street meet. Just off where Tom Jacobi's driveway and the street meet, he was there in the street facing my house about three feet into the street.

Q What happened next?

A Dakota -- his legs went out and he dropped. He tried to crawl probably to the middle of the street when the

third shot was fired as I still stood in the same spot screaming.

Q Where were you standing at this point?

A In the street.

Q How far away from Dakota?

A I didn't move. The only thing that moved was Dakota, so by now, it is a greater distance of about seven feet. He angled to my house.

Q At any time, did Dakota leap up in the air or lung or pounce or anything of that nature?

A No.

Q After the third shot was fired -- Strike that. Between the time that the second shot was fired and the third shot was fired, other than the people that you have already indicated were out on the street watching this, did you see anybody else come out of their house or appear on the scene who may have witnessed the scene?

A No.

Q After the third shot was fired, did anybody else appear on the scene who may have witnessed this scene?

A Right after the third shot was fired, I didn't know if he was going to fire again, so my friend was yelling for me to -- I can't talk -- he yelled for me to run in the house.

MR. LEWIS: Would you like to

take a break?

THE WITNESS: No.

A He yelled for me to run into the house where I saw Barb Simon standing in the doorway.

Q I didn't catch that. Who?

A Barb Simon. She is a friend of the family -- of my family.

Q Barb does not live in that neighborhood?

A No. She was at my house.

Q Then what happened?

A I ran into the house as Barb then pretty much grabbed me and closed the screen door and started to call 911.

Q What happened? Did you see where Tom Jacobi went? Let's take it one person at a time. Did you observe where Tom Jacobi went?

A At this point, I was in the house.

Q So you didn't see --

A The next time I stepped out is when neighbors were outside and that is when we had where this person took off to, not knowing that he had lived in that house. Somebody had said he is right there in the house. I just thought he was walking down the sidewalk, so then that is when I ran up to the door and was crying and screaming why, why, why.

Q Did you hear Dean Jones threaten Tom Jacobi at all that

day?

A No.

Q Did you hear Dean Jones threaten to sue Tom Jacobi on that day?

A He threatened that his father was going to, not himself.

Q Dean Jones yelled out to Tom Jacobi that Dean Jones' father was going to sue Tom Jacobi?

A Pretty much saying my father has a lot of money, we are going to sue your ass. I wasn't paying attention to him. I was bawling, screaming.

Q But Dean Jones did not own this dog. This was your dog. Correct?

A Yes. But he loved Dakota.

(Discussion off the record)

Q I have had an exhibit during the break marked as Exhibit 4. Have you had a chance to look at all those documents?

A Yes.

MR. EISENBERG: Excuse me. You didn't show us the exhibits before you marked them. Would you tell us what they are?

MR. LEWIS: They are the medical exhibits that you faxed me.

Q Have you had a chance to review the exhibits -- the documents in Exhibit No. 4?

A Yes.

Q Those are the medical exhibits that pertain to your treatment in this case. Is that correct?

A That day, yes.

Q And that is April 2, 1999?

A Yes.

Q Are there any other medical reports or expenses that you have not provided us with other than are in Exhibit No. 4?

A My doctor referred me to an employee-based behavioral health program which I saw a psychotherapist named Dr. Trisha Pearson (phonetic) and her reports are still pending. I am going to go see her again as I saw her the end of April -- end of April, beginning of May.

MR. LEWIS: When you get those reports, you can furnish them to your counsel who can furnish them to us?

THE WITNESS: Yes.

MR. LEWIS: Thank you.

Q Now I believe you did not receive any medical treatment between the time that your dog was shot on March 31, 1999 which was about 1:10, 1:15 p.m. and April 2, 1999 at about 7:15 p.m. when the rescue squad was summoned. Is that correct?

A That I didn't?

Q That you did not.
A Not until April 2.
Q So you did not seek any medical treatment because of your witnessing your dog being shot on March 31. Right?
A No.
Q And you didn't seek any medical treatment on April 1. Correct?
A No.
Q The first medical treatment you sought was in the evening of April 2, 1999.
A Yes.
Q What happened on the evening of April 2, 1999, if you recall?
A My boyfriend had went to the vet and picked up Dakota and took him to his mother's house.
Q That would be Dean Jones?
A No. Kevin Spencer.
Q Okay.
A He is my boyfriend.
Q Dean Jones was the gentleman who was with you on March 31, but he is not your boyfriend.
A Yes. He is not my boyfriend.
Q Go ahead.
A Kevin Spencer, my boyfriend, unknown to me, went and picked up Dakota at the vet, brought him to his mother's

house and buried him in the back yard. He called me and told me, which I went hysterical and I guess passed out.

Q Where did you pass out at?

A In my bedroom.

Q What happened after you passed out?

A My mom came in and she said she saw me and called I think 911 and then I went into the ambulance and went to St. Mary's.

Q And initially, did you tell any of the paramedics or EMT's on the site initially that you did not want to go to the hospital?

A That is what my mom said.

Q I didn't understand your answer.

A I don't remember saying that, but my mom said that I kept shaking my head no she said and she wanted me taken realizing that I didn't know what I was saying.

Q So when you went to the hospital, how did you get there?

A The ambulance.

Q How many people were with you in the ambulance?

A Of my family, just my mother rode in the front.

Q Do you remember how many paramedics were with you or anything of that nature?

A I think two or three.

Q When you arrived at the hospital, what sort of treatment

did you receive?

A I was put on IV sodium chloride and given Ativan intravenously and had an examination from a physician.

Q Anything else?

A Given a prescription for Ativan.

Q It is my understanding that the reason you had this attack or you passed out is because --

A I hyperventilated.

Q -- you hyperventilated?

A Which my respirations were slow.

Q This is because you received the news that your dog had been brought back from the vet and buried. Is that correct?

A Yes.

Q Were you released from the hospital that night?

A Yes.

Q You didn't stay overnight, in other words.

A No.

Q What other treatment then did you receive?

A To see my family practice physician which is Dr. -- I can't think of her name. She referred me to the psychotherapist, Trisha Pearson.

Q How many times have you seen Dr. Pearson?

A Once which at that visit, she told me that she would not clear my memory of exactly what happened, but fog my

memory from what happened. I did not want that because I wanted to remember for court reasons.

Q So she offered to do what would be you call I believe hypnotherapy, put you under hypnosis?

A She didn't get into detail, but she said that she would fog my memory of what happened so it would not be so traumatic. As she called it, I had acute traumatic stress disorder.

Q Have you received any other treatment other than that which you have described for this particular incident?

A I talked to her over the phone, which she wanted to see me, but I wanted to remember, so I didn't want to see her to fog my memory, but she said she wanted to see me again, which I will see her again.

Q Now prior to March 31, 1999, had Tom Jacobi ever threatened you personally with any physical harm?

A No.

Q Had Tom Jacobi ever threatened to do damage to any of your personal property, your car or anything of that nature?

A Verbally threatening, no, but pointing a gun, yes.

Q He pointed a gun at you prior to March 31, 1999?

A Not prior.

Q What I am talking about now is before the dog shooting episode.

A No.

Q Had he ever threatened to do harm to Dakota prior -- My question is designed to ask you had he ever threatened Dakota prior to March 31, 1999?

A No.

Q Had you ever gotten into any sort of a quarrel with Tom Jacobi prior to March 31, 1999?

A No.

Q Had any of the Jacobi family quarreled with you or any member of your family prior to March 31, 1999?

A No.

Q And the --

MR. LEWIS: As far as you know, this is the vet records.

MR. EISENBERG: Yes.

MR. LEWIS: I have nothing further.

MR. EISENBERG: I would like you to leave the room with your father. Go out in front and wait for me. Wait. I have like five questions.

EXAMINATION BY MR. EISENBERG:

Q Jacobi testified that the first time he shot, the dog was up on the lawn. Is that the truth?

A No.

Q He said the second time he shot, the dog was up on the

lawn. Is that the truth?

A No.

Q He said the third time he shot, the dog was at the end of the driveway almost in the road. Did you hear that testimony?

A Yes.

Q Is it the truth?

A No.

Q So you are saying that he lied here under oath.

A Yes.

Q You are saying he committed perjury.

A Yes.

MR. LEWIS: Objection.

A Yes.

Q Are you aware of that?

A Yes.

Q You are asserting that he deliberately lied under oath.

MR. LEWIS: Again, I object.

Q Is that correct?

A Yes.

Q Now you saw the trajectory that he drew?

A Yes.

Q And he's got his own trajectory coming right near you. Do you see that?

A Yes.

Q And you are telling the court and Mr. Lewis the same thing, that he fired right at you?

A Yes.

Q He said that it is the third shot that killed the dog. Is that the truth?

A No.

Q It is the second shot that killed the dog?

A Yes.

MR. EISENBERG: That is all I have.

(WHEREUPON, THE DEPOSITION WAS CONCLUDED AT 4:45 P.M.)

(Witness excused)

CERTIFICATE

STATE OF WISCONSIN)
)
COUNTY OF RACINE)

I, SUSAN K. TAYLOR, a Certified Shorthand Reporter and Notary Public in and for the State of Wisconsin, do hereby certify that the foregoing transcript of the deposition of JULIE RABIDEAU, having been duly sworn on October 1, 1999, is true and accurate to the best of my knowledge, skill and ability.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 2nd day of October 1999.

Susan K Taylor

SUSAN K. TAYLOR
Court Reporter

My commission expires:
December 24, 2000

The place was crawling with kids, who watched agape as North "walked the dog."

"OK, Spot. Play dead," he said, allowing his yo-yo to plop to a halt after making it spin on the ground for several seconds. "I call that the dead dog trick."

That this yo-yo Yoda was dropping such one-liners had the crowd of little tykes roaring with delight.

One such fan was Danny Kuzia, 8, a North Park School student. "These are my best ones," he said, pulling a yo-yo out of each pocket. "They sleep good."

Yo-yos are anything but asleep these days.

"At Christmas, all my kids wanted a

Barry North

yo-yo and all their friends wanted yo-yos," said Danny's mom, Barrie Kuzia. "There's yo-yos flying around our house all the time."

Several parents expressed a sinking feeling they'd soon see furniture damage. Jacob Heineck, 9, a fourth grade West Ridge School student, is limited to yo-yoing in his room and the basement.

His time commitment: "Not that much. About two hours a day."

Meanwhile, yo-yo man North, of Rolling Meadows, Ill., was showing off

Meanwhile, Melissa Goetz, 9, watched in amazement as her little brother, Michael, managed to copy North's walk-the-dog trick.

"My gosh," the St. Rita's fourth-grade girl said, her eyes widening at the 7-year-old's spinning yo-yo. "I can't barely even do that yet."

For more, drop in on Burlington's Yo-Yo Fun

- Yo-Yo Camp: Aug. 12, for ages 8 and up.
- Yo-Yo Days: April 15-16, 2000, with Barry North judging and performing.
- For information, call 763-3946 — The Spinning Top Museum.

for more than a year, said Moyer. In fact, a public hearing explaining the plans was held several months back.

And this is not the first time Yorkville has undertaken runoff projects. A retention pond was put in place about two years ago behind the softball complex by Highway 71 and I-94. That project helps control runoff from the nearby warehouse complex.

Serving on the board overseeing the Ives Grove Storm Water District are the members of the town board and residents Barney Barber of the Deerhaven subdivision, located off Highway C, and Donald W. Tubman, who lives on Highway C. The board of the new district will meet on the third Tuesday each month at town hall.

Woman files case over shooting of pet dog

BY MARCI LAEHR TENUTA
Journal Times

RACINE — A $250,000 claim against the city for the shooting of a woman's dog by an off-duty police officer last March has been denied, and the woman is now suing for $4,999.

A complaint was filed Thursday in Racine County Small Claims Court for Julie Rabideau by her attorney, Alan D. Eisenberg of Milwaukee.

Eisenberg said the Racine Police Department has not been held accountable for the death of his client's pet.

"A big part of this is why Julie Rabideau persists," he said. "She feels the police department has not been accountable. The police must be accountable."

The large decrease in the amount of money Rabideau's complaint seeks compared to the initial claim is because at the time the claim was filed they were unsure what the long-term consequences on Rabideau's health would be, Eisenberg said.

According to the complaint filed Thursday, she collapsed following the shooting of her dog and required medical attention.

"It appears there will not be long-term consequences," Eisenberg said Thursday.

Rabideau's dog, a Rottweiler, was shot by off-duty officer Thomas Jacobi on March 31. Police reports said Dakota came into Jacobi's front yard, where he was playing with his wife, daughter and their own pet, and the Rottweiler began to attack Jacobi's smaller dog. Police said Jacobi fired three shots at Dakota after he was unsuccessful in separating the dogs by shouting at them.

Rabideau argued her dog did not attack Jacobi's pet and was returning to her nearby home when it was shot and killed.

The recommendation to Racine's Common Council from the City Attorney's Office to deny Rabideau's claim was made by Assistant City Attorney Scott Lewis.

Lewis said Thursday he would not spell out the reasons for the denial because of Rabideau's lawsuit.

"I'm not going to comment on the merits of the case," he said.

Lewis explained that anytime someone is going to sue the city they have to bring a claim against the city first.

"And give us a chance to investigate it before any suit can be sought," he said. "The city investigated (Rabideau's claim) and determined the claim was without merit. As to why - that will be left to the courtroom and other proceedings."

Eisenberg called the investigation of the shooting a cover-up.

"This is not justice," he said. "The police reports and District Attorney's response to my client is utterly outrageous. Frankly, I think there's been a concerted cover-up."

Recently, Racine County District Attorney Robert Flancher announced no criminal charges would be made against Jacobi for his actions in the incident.

At the time, spokesperson for the police department Sgt. Jerry Baldukas said the entire investigation had been handed to Flancher, and he decided Jacobi had done nothing unlawful.

State statue allows a person to intentionally kill a dog if a domestic animal owned by the person is threatened with serious bodily harm by the dog, on the person's property, police said.

Racine Zoo slates annual car classic

RACINE — The Racine Zoo will host its fourth annual Zoo Car Classic from 9 a.m. to 4 p.m. Aug. 22 at the zoo, 2131 N. Main St.

Vintage classics from 1900 to 1981 will be on display. Motorcycles are also included in this year's show. The registration fee for display vehicles and cycles is $10 the day of the event. Pre-registration is $8

Three trophies will be awarded in each class at 3:30 p.m.

Clowns, face painting and food will be available for all visitors and car classic participants. Admission to the zoo is free.

All proceeds from the Zoo Car Classic will benefit the Racine Zoological Society.

For a registration form or

EXHIBIT
A

STATE OF WISCONSIN CIRCUIT COURT SMALL CLAIMS RACINE COUNTY

COPY

JULIE RABIDEAU,
Plaintiff

v. Case No. 99-SC-3859

CITY OF RACINE
Defendant,

AFFIDAVIT OF JULIE RABIDEAU

Julie Rabideau, being first duly sworn on oath , deposes and states as follows:

1. On March 31, 1999, one Thomas Jacobi, a member of the City of Racine Police Department, shot and killed my Rottweiler dog named "Dakota."

2. Dakota did not attack any dog as alleged by Thomas Jacobi.

3. That a report by a veterinarian said that Dakota showed no signs of an attack.

4. That there never was any altercation between Dakota and Mr. Jacobi's dog.

5. That Mr. Jacobi's statement that he "attempted to separate the dogs" is false as there was no reason for that action to be taken.

6. That neither Thomas Jacobi's wife or daughter ever screamed.

7. That the only screaming at the time was by Affiant.

8. That Mr. Jacobi's alleged fear for the safety of his wife, daughter, and dog are so totally unreasonable as to be false.

9. That Dakota did not weight some 25 pounds mor than Mr. Jacobi's dog, as in fact their weights were close to being the same.

10. That Mr. Jacobi's dog never cowered.

11. That Dakota never "tore into" Mr. Jacobi's dog's neck.

12. That Dakota did not have "dangerous propensities."

13. That Dakota have never attacked Mr. Jacobi's dog previously.

14. That Dakota had never attacked neighbors' dogs and children in the neighborhood, but was involved in one situation of a dog at large.

15. That Mr. Jacobi intentionally aimed his gun at Dakota and shot the gun right at the dog three times even though Affiant was standing within two feet of the dog.

16. That the second shot hit Dakota from behind and was the cause of his death.

17. That Affiant was horrified and frightened for her own life and for the life of Dakota at this irresponsible action by Mr. Jacobi, a police officer who is supposed to protect the public.

18. That Dakota never attacked Mr. Jacobi's dog, either before or after the irresponsible shooting by Mr. Jacobi.

19. That Mr. Jacobi never shot at the ground as he alleged, but was aiming his gun at Dakota as he shot, showing no regard for life or property.

20. After being viciously, maliciously and irresponsibly shot by Mr. Jacobi, Dakota crossed the street, obviously in horrible pain, wimpering and bleeding profusely.

21. That Mr. Jacobi's statement that Dakota snarled and appeared ready to charge Mr. Jacobi, his dog, his family or a combination is false.

22. That none of Mr. Jacobi's shots were at a downward angle.

23. That Affiant was next to her dog at all times, horrified at Mr. Jacobi's actions.

24. That since Dakota was not attacking anyone or any dog or acting viciously or posing a threat to anyone or any dog, there was no reason for Affiant to restrain Dakota.

25. That Affiant, her friend Dean Jones, and several neighbors including small children were close enough to the gunshots that Mr. Jacobi's use of his firearm was reckless and dangerous.

26. That Mr. Jacobi's shooting and killing of Dakota was unwarranted in that Dakota never attacked Mr. Jacobi's dog and never make any motion to attack Mr. Jacobi or his family.

27. That Affiant has sufficient information to form a belief that the shooting of Dakota was done out of malice, spite and/or retaliation against Affiant.

28. At no time did Mr. Jacobi attempt restraining actions (none were needed anyway) nor did he move as much as an inch or say anything. He merely drew his gun when Dakota began to cross the street.

29. At no time was any person threatened by Dakota with serious bodily harm.

30. That immediate action to shoot and kill Dakota was not necessary.

31. That Dakota never was on Mr. Jacobi's property.

32. That Dakota was only in the street and on the grassy area, which is also a public area, between the sidewalk and the curb.

33. That Mr. Jacobi was walking his dog two days later and the dog showed no sign of injury as Mr. Jacobi's dog was not injured by Dakota.

34. That after shooting twice at Dakota and hitting him with the second shot, Mr. Jacobi aimed a third time at Dakota, missed Dakota but the bullet ricocheted off the street in the presence of several individuals creating an extremely dangerous situation.

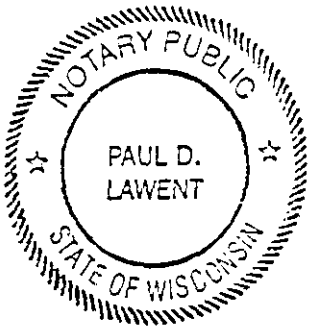
Dated this 22nd day of September, 1999.

Lori L Poldoan

Subscribed and sworn to before me this 22nd day of September, 1999.

Paul D. Lawent

Notary Public, Milwaukee County, WI
My commission: is permanent



M 786725

WISCONSIN UNIFORM MUNICIPAL COURT CITATION AND COMPLAINT

☐ Juvenile

*Deposit Permitted $ ☐ Cash ☐ Card

(For Court Use only)

You Are Notified To Appear

Is this a mandatory appearance? ☐ yes ☒ no

(Read the reverse side of this citation for court information.)

Date

Time ☒ AM ☐ PM

Municipal Court

Plaintiff: ☒ City ☐ Village ☐ Town OF:

Defendant Name - Last / First / MI

Street Address / Post Office / State / Zip Code

Driver License Number or Other I.D. (specify) / State / Exp. Yr.

Date of Birth / Sex / Race / Height / Weight / Hair / Eyes

License Plate Number / Plate Type / State / Exp. Yr.

Defendant Violated: / Adopting State Statute No. / Ordinance No.

Description of Violation

Week Day	Month - Day - Year	Time		At:	Name & Address of Parent/Guardian/Legal Custodian (if minor defendant)
			☐ AM ☐ PM	County:	

Citation Served: ☒ Personally ☐ Mailed to defendant's last known address

Age

☐ Left with person residing at defendant's residence: Name

Print Officer Name / Department / I.D. No. / Date Citation Issued / Telephone Number of Parent/Guardian/Legal Cust

AGENCY COPY

MC-2000, 12/97

PENGAD-Bayonne, N. J.

DEPOSITION EXHIBIT 3

The Dalles AGENCY RECORD

Date of Disposition: 10/15/98

FINDING: ☐ Guilty ☐ Dismissed ☐ Default ☐ Forfeiture ☐ Not Guilty $ Sixth

PLEA: ☐ Guilty ☐ No Contest ☐ Not Guilty

Other Disposition:

on 5 yrs Off Susp.

Court Clerk

Comments

Incident Report

(W) Kuske, Coleen A. F/W 05/30/66 1011 Shore Crest Dr. East On 639-7048

(M) RABIDEAU, Mike S H/W 04/13/79 1127 Sheraton 681-3476

(M) JOHNSON, AMY F/W 02/03/79 681-2976

ON 06/25/98 at about 2020 hrs I was dispatched to 1011 Shorecrest Dr. regarding a dog attacking another dog. I spoke with Coleen Kuske who stated she was walking her dog on the North side walk in the 1100 blk. of Sheraton Dr. when a black rottweiler from 1127 Sheraton Dr bit her dog several times. Coleen said the rottweiler came across the street and attacked her dog. Collins dog was on a leash. Coleens dog had a puncture mark on the right rear leg and in the neck, which I could see.

U.I.C. / U.M.C.C.:

SUPPLEMENT 2 of 2 98-53377

I went to 1127 Sheraton Dr and spoke with Amy, A friend to the owner of the rotweiller Julie RABIDeau. Amy said she was playing with DOKOTA the rotweiller in the back yard. When Coleen was walking her dog on the sidewalk. Dokota left the property and went across the street and attacked Coleens dog, while on the city sidewalk. Mike and Amy were able to get Dokota off Coleens dog. Julie wasn't home at the time of the incident, but said, She is responsible for the dog. Julie does have the dog fenced in the rear yard, but somehow the dog (Dokota) was able to leave the property. PP 132

RACINE POLICE DEPARTMENT

J. Schl #1906

CC: City Atty.

STATE OF WISCONSIN | CIRCUIT COURT | RACINE | COUNTY

Plaintiff (Names and Addresses):

Julie L RABIDEAU
1127 SHERATON DR.
RACINE, WI 53402

-vs-

Defendant (Names and Addresses)

TO: CITY OF RACINE
730 WASHINGTON AVE.
RACINE, WI 53403

SUMMONS AND COMPLAINT
SMALL CLAIMS

Case No. 99 SC 3859

FILED
JUL 29 1999
CLERK OF COURTS

- [x] Claim Under Dollar Limit 31001
- [ ] Replevin 31003
- [ ] Eviction 31004
- [ ] Re: Arbitration Award 31006

SUMMONS

To the Defendant:
You are being sued as described below. If you wish to dispute this matter:
1. You must appear at the time and place stated. (and/or)
2. You may file a written answer on or before the date and time stated. (A duplicate copy must be provided to the plaintiff/attorney.)

If you do not appear or answer, a judgment may be granted to the plaintiff.

Clerk/Attorney Signature	Date Summons Issued	Date Summons Mailed
Rose M. Poch		

When to Appear

Date 8-27-99 (8-24-99) | Time 8:15am (3:00pm)

Place to Appear

8th Floor Assembly Area
Courthouse
730 Wisconsin Ave
Racine WI 53403

COMPLAINT

Plaintiff's Demand:
The plaintiff states the following claim against the defendant:

1. Plaintiff demands judgment for: *(Check as appropriate.)*
   - [x] Money $ 4,999.00
   - [ ] Eviction
   - [ ] Return of property *(Describe in 2. below.)*
     (Not to include §425.205, Stats. actions to recover collateral.)
   - [ ] Confirmation, vacation, modification or correction of arbitration award.

   Plus interest, costs, attorney fees, if any, and such other relief as the court deems proper.

2. Brief statement of dates and facts:

City of Racine Police Officer Thomas Jacobi shot and killed my dog, Dakota, and caused me to collapse and require medical attention.

- [ ] Mark box if additional information is attached.

Signature of Plaintiff/Attorney	Date	Law Firm and Address
Attorney's Telephone Number	Attorney's State Bar Number	

Subscribed and sworn to before me
on 7-28-99
Notary Public, State of Wisconsin
My commission expires: 1-1-2000

Verification: Under oath, I state that the above complaint is true, except as those matters stated upon information and belief, and as to those matters, I believe them to be true
I am: [ ] plaintiff. [ ] attorney for the plaintiff.

Julie L Rabideau
Signature of Plaintiff/Attorney

STATE OF WISCONSIN CIRCUIT COURT RACINE COUNTY

1/30 cc: City Atty. COPY

JULIE L. RABIDEAU

1127 Sheraton Drive

Racine, WI 53402

Plaintiff and Address

vs.

CITY OF RACINE

730 Washington Avenue

Racine, WI 53403

Defendant and Address

COMPLAINT

SMALL CLAIMS – CLAIM UNDER DOLLAR LIMIT
(Case Code No. 31001)

FILED
JUL 29 1999

For Plaintiff's claim against Defendant, Plaintiff states that:

1. Plaintiff's injuries or losses occurred on or about March 31 (Month / day), 1999, and under the *following circumstances (briefly state the facts of your claim)*:

City of Racine Police Officer Thomas Jacobi shot and killed my dog, Dakot
and caused me to collapse and require medical attention.

FILED
1999 JUL 29 AM 8:43
CLERK

2. WHEREFORE, Plaintiff demands judgment for: (check appropriate items)

____ a. Confirmation, vacation, modification or correction of arbitration award.

X b. The sum of $ 4,999.00 (enter amount),

together with attorney fees, if any, costs of this action, and such other relief as the court deems proper.

RECEIVED
AUG 02 1999
CITY ATTORNEY

Signed: _____
Plaintiff's Attorney or Plaintiff

Address: 3111 W. Wisconsin Ave.
Milwaukee, WI 53208-3957

1010803 (414) 344-3333
State Bar No.

STATE OF WISCONSIN | CIRCUIT COURT SMALL CLAIMS | RACINE COUNTY

JULIE RABIDEAU,
Plaintiff,

v.

Case No. 99-SC-3859

CITY OF RACINE,
Defendant.

MEMORANDUM OF LAW
IN SUPPORT OF DEFENDANT'S
MOTION TO DISMISS

I.

STANDARD FOR JUDGMENT ON THE PLEADINGS

Section 802.06(2)(a), Wis. Stats., provides that a motion to dismiss can be brought based upon failure to state a claim upon which relief can be granted. §802.06(2)(b) provides that such a motion should be treated as one for summary judgment if matters outside the pleadings are presented to the court. The facts as pleaded must be taken as admitted, but "even if negligent conduct as a cause-in-fact of plaintiff's physical injury could be found upon proof of certain facts, policy considerations may preclude liability." *Morgan v. Pennsylvania General Insurance Co.*, 87 Wis.2d 723, 731, 275 N.W.2d 660 (1979). "Under Wisconsin's liberal construction of pleadings ... a claim will be dismissed on the pleadings only if 'it is quite clear that under no condition can the plaintiff recover.'" *Kleinke v. Farmers Coop. Supply & Shipping*, 202 Wis.2d 138, 143, 549 N.W.2d 714 (1996).

As will be explained below, damage or injury to the plaintiff's personal property cannot result in liability under a negligent infliction of emotional distress claim as a matter of law.

II.

FACTS

The basic facts are not in dispute.

The facts as alleged in Plaintiff Julie Rabideau's small claims complaint are that "City of Racine Police Officer Thomas Jacobi shot and killed my dog, Dakota, and caused me to collapse and require medical attention." The City of Racine does not dispute that Thomas Jacobi shot a canine named "Dakota" owned by the Plaintiff. The City does not dispute that Ms. Rabideau witnessed the shooting of her canine as a bystander. The City also does not dispute that "Dakota" died as a result of gunshot wounds.

The City does dispute that Mr. Jacobi was acting in his capacity as a City of Racine police officer at the time of the shooting (City's affirmative defense number 7) and contends that, even if *arguendo* he was acting in his capacity as a police officer, he was privileged under §174.01(1), Wis. Stats., to intentionally kill the canine "Dakota" in defense of his own canine, "Jed", and in defense of his daughter, his wife and himself. (City's affirmative defense number 9; Jacobi aff. paras. 1-6, 12.)

Mr. Jacobi fired his shots solely in defense of his own canine and in defense of his family and himself. His actions were not in any way motivated by animosity

toward Ms. Rabideau or the fact that "Dakota" was owned by Ms. Rabideau. (Jacobi aff., para. 12.) At no time was Ms. Rabideau in the line of fire, Mr. Jacobi never pointed his weapon at Ms. Rabideau, shouted at Ms. Rabideau, or demonstrated any aggressive behavior toward Ms. Rabideau. (Jacobi aff., para. 11.)

III.

ARGUMENT

Ms. Rabideau alleges that she collapsed and required medical attention because, as a bystander, she witnessed the shooting of her canine. For purposes of summary judgment, the City will not dispute this allegation.

What makes this case ripe for summary judgment is that Ms. Rabideau's cause of action is for negligent infliction of mental distress. The fact that her claim is for mental distress is buttressed by a statement attributed to her attorney, Alan Eisenberg, in an article in the July 30, 1999 Racine *Journal Times* on page 1C. Attorney Eisenberg indicates in the article that the reason Ms. Rabideau's original claim against the City was reduced from $250,000.00 to $4,999.00 was "because at the time the claim was filed they were unsure what the long term consequences on Rabideau's health would be...." "It appears there will not be long-term consequences," Mr. Eisenberg is quoted as saying. (Lewis aff., para. 3, Exhibit A.)

Ms. Rabideau does not contend in her complaint that Mr. Jacobi shot her canine with the intent of causing her severe emotional distress. This is not a case of one person injuring or killing another's pet in order to deliberately cause anguish

to that person, such as the bunny boiling in the movie *Fatal Attraction* or the horse-head-in-the-bed scene in the *Godfather*.

In order for the tort of intentional infliction of mental distress to be sustained the "plaintiff would have to prove that the defendant intended to cause emotional distress...." *Bowen v. Lumbermens Mutual Casualty Co.*, 183 Wis.2d 627, 639, 517 N.W.2d 452, 437 (1994). Wisconsin Jury Instructions - Civil number 2725, "Intentional Infliction of Emotional Distress," states that "[f]or a person's conduct to be intentional, you must find that the person acted for the purpose of causing emotional distress to the other person."

Looking at this case in the light most favorable to Ms. Rabideau it can only be concluded that she seeks damages for negligent - rather than intentional - infliction of emotional distress. As a matter of law in Wisconsin a plaintiff cannot recover damages for negligent infliction of emotional distress based on damage or injury to the plaintiff's *property*. This rule is based upon public policy considerations as the court explained in *Kleinke*, *supra*, 202 Wis.2d at 145-146:

> An evaluation of these public policy criteria leads us to conclude that it is unlikely that a plaintiff could ever recover for the emotional distress caused by negligent damage to his or her property. First, emotional distress based on property damage is the type of injury that will usually be wholly out of proportion to the culpability of the negligent party. The emotional pain that is recoverable in negligent infliction of emotional distress cases must be related to an extraordinary event. Having one's property damaged is not nearly as devastating as witnessing or being involved I the loss of a close relative, such as in *Bowen*. This is not to say that people cannot become extremely distraught when they learn of damage to their property, especially property which is quite significant to them personally. However, as this court stated in *Bowen*, such types of distress are not "compensated because [they are] life experience[s]

that all [unfortunately] may expect to endure." *Bowen*, 183 Wis.2d at 660.

Second, allowing recovery would place an unreasonable burden on the negligent actors in property damage cases. The defendants are already liable for the cost of the damage to the property. It would be unfair to also hold them liable for the emotional distress that the damage caused the owners. This is particularly true when the property involved has some sentimental value. In such cases the value of the property itself could be quite small while the recovery for the distress could be significant. Allowing recovery for emotional distress in such cases would be a windfall to the plaintiff and unfair to the defendant.

Third, allowing recovery in such cases creates the possibility of future fraudulent claims. The greater a plaintiff's attachment or sentimental felling toward the property in question, the greater his or her claim for damages could be. To determine when such an attachment to property is real and when it is false, and to determine exactly how significant the attachment is, would be difficult, if not impossible. Every plaintiff in a negligent property damage case would be encouraged to claim an extreme emotional attachment to the damaged property.

Finally, allowing recovery in such cases would remove any logical stopping point to a tortfeasor's liability. Each and every plaintiff in any property damage claim could assert an emotional distress claim based not on the effect of the incident itself, but on how their lived had changed since the underlying incident. Such an allowance could open the way to recovery for stress incurred by any amount of damage to any type of property.

The Wisconsin Jury Instructions - Civil number 1510, "Negligent Infliction of Severe Distress (Bystander)," indicates that "emotional distress" can arise from witnessing serious injury or death "to a family member or coming upon the scene minutes later and witnessing the aftermath." The use of the term "family member" is in keeping with the holding in *Bowen*, *supra*, 183 Wis.2d at 633, where the court stated that "legal cause in the bystander fact situation" in cases of alleged negligent infliction of emotional distress must involve a scenario wherein "the

victim and the plaintiff must be related as spouses, parent - child, grandparent - grandchild or siblings."

IV.

CONCLUSION

The *Kleinke* holding is dispositive of the case at bar. A canine is not a human being - under the law, a canine is considered to be personal property. The Wisconsin Supreme Court has determined that the witnessing or chancing upon an incident involving damage to one's property is not actionable under a negligent infliction of emotional distress theory. The complaint must be dismissed.

Dated this 27th day of August, 1999.

Respectfully submitted,
OFFICE OF THE CITY ATTORNEY
Attorneys for City of Racine

Scott Lewis
Assistant City Attorney
SB # 1014551

P. O. Address:
730 Washington Av
Racine, WI 53403
(414) 636-9115

STATE OF WISCONSIN
SUPREME COURT

Docket No. 99-3263

JULIE L. RABIDEAU,

Plaintiff-Appellant-Petitioner,

v.

CITY OF RACINE,

Defendant-Respondent.

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT-PETITIONER

RACINE COUNTY

JUDGE ALLAN B. TORHORST

Respectfully submitted:

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ISSUES PRESENTED

I. **DID THE PLAINTIFF STATE A CLAIM FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS IF ALL THE FACTS ARE CONSTRUED IN HER FAVOR?**

The Court of Appeals answered: No.

The trial court answered: No.

II. **DID THE PLAINTIFF STATE A CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS IF ALL THE FACTS ARE CONSTRUED IN HER FAVOR?**

The Court of Appeals answered: No.

The trial court answered: No.

III. **DID THE PLAINTIFF'S COMPLAINT, LIBERALLY CONSTRUED, STATE A CLAIM FOR PROPERTY LOSS?**

The Court of Appeals answered: No.

The trial court answered: No.

ISSUES PRESENTED - CONTINUED

IV. WAS THE PLAINTIFF'S CLAIM FRIVOLOUS?

The Court of Appeals answered: Yes.

The trial court answered: Yes.

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

By accepting the Petition for Review, this Court deemed the case sufficiently important to merit oral argument and publication.

STATEMENT OF THE CASE AND FACTS

On March 31, 1999, City of Racine police officer Thomas Jacobi shot and killed a dog owned by Julie Rabideau. Record 7, pp. 11-16. Officer Jacobi and Rabideau lived across the street from each other. Id., p. 9. Officer Jacobi had just finished a shift and was still in uniform and carrying his equipment, including a service revolver, two magazines, pepper spray, a baton and his badge. Id., pp. 9-12. The trial court found he was acting as a police officer when he shot and killed the Rabideau's dog. Record 19, p. 4.

Exactly how the shooting occurred was hotly contested as Rabideau and Officer Jacobi gave radically different versions of the incident. According to Rabideau, she and a friend had just returned home when her dog jumped out of their truck and ran across the street and began sniffing Officer Jacobi's dog. Record 16, pp. 16-17. As Rabideau headed toward her house to drop off

some packages, she noticed the friend with whom she had returned had a frightened look on his face, which she later learned was because he saw Officer Jacobi with his gun drawn. Id., pp. 17-19. However, as Rabideau (who had put her packages on the hood of the truck) began walking across the street to retrieve her dog, she didn't notice the gun. Id. pp. 17-18.

Rabideau called her dog which then stepped off the curb toward her. Id., p. 19. When she was only about three feet from the dog, she heard a shot ring out which caused both her and the dog to freeze. Id., p. 19. A few seconds later while she was still just a few feet from her dog, Officer Jacobi fired a second shot which struck her dog. Id., pp. 21-22. Then, as the dog tried to crawl away, Officer Jacobi fired a third shot which missed. Id., pp. 22-24. Ms. Rabideau was emphatic that her dog never bit Officer Jacobi's dog. Id., p. 21. Moreover, she testified that

neither dog had ever been acting aggressively toward each other. Id. pp. 21-22. She further stated that her dog never leapt, pounced or lunged at anything or anybody. Id., p. 23.

Officer Jacobi's version of the events was radically different. According to Officer Jacobi, the Rabideau's dog had come across the street and attacked his dog. Id. pp. 7-10. He claimed that the Rabideau dog bit his dog in the neck and was growling, although he acknowledged it did not draw blood. Id. at pp. 7-10. He maintained, however, that Rabideau's dog bit his dog several times and that he yelled and eventually shot at the dog while it was engaged with his dog on the boulevard in front of his house.[1] Id., pp. 10-12. He missed and a short time later, the dogs were fighting again. Id., p. 12. From just a few feet away, he shot again but again, he missed. Id., pp. 12-13. Officer

[1] No evidence was ever put in, however, to document any injuries to Officer Jacobi's dog.

Jacobi did admit that this second shot (as evidenced by the exhibit at his deposition) traveled toward where he claimed Ms. Rabideau was watching all of this unfold from across the street. Id., pp. 12-13 and Exhibit 1.

According to Officer Jacobi, the second shot caused the dogs to disengage. Id., p. 13. This time, Officer Jacobi alleged the Rabideau's dog did not re-engage with Officer Jacobi's dog but instead, ran to the edge of his driveway where it continued to snarl and growl. Id. pp. 16-17. According to Officer Jacobi, as it stood "facing away" from Officer Jacobi, but with its head turned looking back toward Officer Jacobi, he shot it and the bullet entered the dog from the rear. Id. This is how Officer Jacobi accounted for the apparently undeniable fact that the dog was shot from the back. He agreed the dog went down and it is undisputed it eventually died from the wound. Id.

On July 28, 1999, Ms. Julie Rabideau started a small claims action against the City of Racine. Record 1. She used a standard form complaint to start the case. Id. Ms. Rabideau stated that her losses occurred on March 31, 1999. Id. In response to the standard form request for a brief statement of the facts of her claim, Ms. Rabideau wrote "City of Racine Police Officer Thomas Jacobi shot and killed my dog, Dakota, and caused me to collapse and require medical attention." Id. Ms. Rabideau categorized her claim as a tort and requested $4,999.00 in damages. Id.

By motion filed August 31, 1999, the Defendant moved to have the matter dismissed. Record 5. The Defendant contended that Ms. Rabideau had failed to state a claim upon which relief could be granted. Id. The Defendant filed a brief in support of its motion to dismiss. Record 7. On September 29, 1999, the Plaintiff filed a response to the Defendant's motion to

dismiss. Record 8. On October 4, 1999, both parties appeared at the motion hearing and following argument, the court took the matter under advisement. Record 19, pp. 1-2.

The trial court issued a written decision on October 14, 1999. Record 19. The trial court concluded that the exemptions of section 174.02(1), WIS. STATS., were applicable to Officer Jacobi. Record 19, pp. 3-4. The trial court also concluded that Ms. Rabideau could not recover for negligent infliction of emotional distress. Finally, the trial court concluded the complaint was frivolous under section 814.025(3)(b), WIS. STATS., in that Ms. Rabideau's attorney should have known it was without any reasonable basis in law. Id. at pp. 6-7. The trial court therefore required Ms. Rabideau's attorneys to pay the Defendant's costs associated with this action. Id. at p. 7.

Rabideau appealed. On June 7, 2000, the court of appeals affirmed the trial court's decision in all respects. Appendix, pp.

101-110. The court of appeals held that Rabideau's complaint could not be construed as a claim for property loss because she did not specifically ask for the value of her property. Appendix, p. 105. The court of appeals held that Rabideau also did not state a claim for negligent infliction of emotional distress because a bystander claim works only with the loss of a relative, not property. Appendix, pp. 105-06. The court of appeals also held Rabideau did not state a claim for intentional infliction of emotional distress because, among other things, it is not outrageous or extreme conduct for an individual to shoot and kill another person's dog simply because it is sniffing his dog. Appendix, p. 107. Finally, without any discussion, the appellate court summarily affirmed the holding that Rabideau's complaint was frivolous. Appendix, p. 108.

STANDARD OF REVIEW

This case presents issues which are purely legal in nature. A review of the record reveals that it is difficult to determine whether the trial court dismissed Rabideau's action on the pleadings or on a motion for summary judgment. Either way, however, the dismissal came at a stage where the trial court was obliged to view the facts in the manner most favorable to the non-moving party: Rabideau. Amer. Med. Transp. v. Curtis-Universal, 154 Wis. 2d 135, 144, 452 N.W.2d 575 (1990); Jorgensen v. Water Works, Inc., 218 Wis. 2d 761, 768, 582 N.W.2d 98 (Ct. App. 1998).

Accordingly, there are no factual disputes clouding the legal issues presented herein.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DISMISSED THE CASE ON THE GROUNDS THE EXEMPTIONS OF SECTION 174.01, WIS. STATS., APPLIED IN THIS CASE BECAUSE THE AVAILABILITY OF THE EXEMPTIONS DEPENDS UPON WHETHER THE PREREQUISITE FACTS EXISTED AND THOSE FACTS ARE IN DISPUTE.

If one were to take the trial court's decision at face value, one might surmise that in the course of litigating her claims against the City, Rabideau failed to marshal facts sufficient to meet the legal standard for recovery. One might further conclude that her failure lie in her inability to set forth facts which were sufficiently egregious to remove Officer Jacobi from the umbrella of immunity provided by section 174.01, WIS. STATS. This would be the wrong point of departure for review of this case because in reaching its decision, the trial court utterly failed to follow the proper methodology and in fact

based its decision on a view of the facts most favorable to the *moving* party. Once this is understood, a paradigm for addressing the legal issues emerges:

> (1) Is a dog mere chattel such that its negligent or intentional destruction, without privilege, cannot give rise to any claim for emotional distress?
>
> (2) If a dog is nothing more than mere chattel, did Rabideau state a claim for relief for recovery of the lost property value of her dog?
>
> (3) If a dog is mere chattel and Rabideau's pleadings cannot be construed as a claim for property loss, was her claim utterly frivolous?

The trial court dismissed Rabideau's complaint because it concluded section 174.01 provided an unequivocal exemption from liability. By its very terms, however, section 174.01 requires that certain facts exist for the exemption to apply:

(1) KILLING A DOG. (a) Except as provided in par. (b), a person may intentionally kill a dog only if a person is threatened with serious bodily harm by the dog and:

1. Other restraining actions were tried and failed; or

2. Immediate action is necessary.

(b) A person may intentionally kill a dog if a domestic animal that is owned or in the custody of the person is threatened with serious bodily harm by the dog and the dog *is on property owned or controlled by the person and:*

1. Other restraining actions were tried and failed; or

2. Immediate action is necessary.

(2) INAPPLICABLE TO OFFICERS, VETERINARIANS AND PERSONS KILLING THEIR OWN DOG. This section does not apply to an officer acting in the lawful performance of his or her duties under s. 29.931 (2) (b), 95.21, 174.02 (3) or 174.046 (9), or to a veterinarian killing a dog in a proper and humane manner or to a person killing his or her own dog in a proper and humane manner.

(3) LIABILITY AND PENALTIES. A person who violates this section:

(a) Is liable to the owner of the dog for double damages resulting from the killing;

(b) Is subject to the penalties provided under s. 174.15; and

(c) May be subject to prosecution, depending on the circumstances of the case, under s. 951.02.

It is not clear whether the trial court held section 174.01(1) or section 174.01(2) to be dispositive of this case. At one point, the trial court stated "it appears from the facts that the exemptions given to officers named in **section 174.01(2)** apply to this case." Record 19, p. 3. (Emphasis added). Later, however, the trial court stated "[t]he Court finds that the defendant is entitled to the protection afforded a person killing a dog pursuant to **section 174.01(1)**, Stats." Record 19, p. 5. (Emphasis added). Because the trial court's reasoning cannot be gleaned from its decision, both subsections must be examined.

It is difficult to understand how the trial court could conclude that there was no dispute as to the existence of the facts necessary to justify killing a dog under section 174.01(1). It is remarkable that the trial court reasoned that the facts of this case were not substantially in dispute. The trial court stated:

The basic facts are not substantially in dispute. The Plaintiff's dog had, prior to Thomas Jacobi shooting the dog, crossed the City street/road from the Plaintiff's residence to the Jacobi residence. The Plaintiff's dog and Jacobi's dog became involved in a fight on the Jacobi property and during the fight Thomas Jacobi shot three times striking the Plaintiff's dog on the last shot. The Plaintiff's dog was on Jacobi's property when shot.

Jacobi was garbed with his police paraphernalia at the time of the shooting, however, dressed in civilian clothes and displaying his shield by a chain around his neck.

At the time of the shooting the Plaintiff was, in fact at all times during the incident, across the street upon her property. An affidavit submitted by the Plaintiff contradicts certain details of the deposition testimony of Thomas Jacobi and Rebecca Jacobi.

* * *

The Plaintiff's dog was shot by Thomas Jacobi, while he was acting as a police officer. The Plaintiff's dog was attacking Jacobi's dog in the presence and immediately adjacent to Jacobi, Rebecca Jacobi, his wife, and their child. The facts from the affidavits and deposition testimony, **viewed most favorable to the Plaintiff**, unequivocally establish that immediate action was necessary in order for Jacobi to protect himself and his family and the Jacobi's dog. The Plaintiff's dog was attacking without any restraint being offered by the Plaintiff; there was no evidence of any meaningful restraint by the Plaintiff concerning her dog.

The Court is satisfied that the protection afforded a person killing a dog pursuant to Chapt. 174 is available to Thomas

> Jacobi and thus the City. On this basis, the matter will be dismissed.

Record 19, pp. 3-4 (emphasis supplied).

It was absurd to say this version of events constituted the version most favorable to Rabideau. It is ludicrous to say the facts from the affidavits and deposition testimony "viewed most favorably to the Plaintiff," unequivocally established that immediate action was necessary for Officer Jacobi to protect himself, his family, and his dog. These supposedly undisputed facts were flatly contradicted by Rabideau, both in her deposition and the affidavit she submitted.

When addressing a motion to dismiss, the trial court is obliged to view the facts in the light most favorable to the non-moving party. Specifically, a court first examines the pleadings to determine whether a claim for relief is stated and whether a material issue of fact is presented. See, e.g., Voss v. City of

Middelton, 162 Wis. 2d 737, 747, 470 N.W.2d 625 (1991); Grams v. Boss, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980). When examining the sufficiency of a complaint, a court takes as true all facts pleaded by the plaintiff and all inferences that can reasonably be derived from those facts. See Voss, 162 Wis. 2d at 748.

If the pleadings state a claim and demonstrate the existence of factual issues, a court next considers the moving party's affidavits or other proof to determine whether the moving party has made a prima facie case for summary judgment under section 802.08(2), WIS. STATS. See, e.g., Voss, 162 Wis. 2d at 747-48; Grams, 97 Wis. 2d at 338. If a moving party has made a prima facie case for summary judgment, the opposing party must show, by affidavit or other proof, the existence of disputed material facts or undisputed material facts from which reasonable alternative inferences may be drawn that are

sufficient to entitle the opposing party to a trial. See, e.g., Voss, 162 Wis. 2d at 748; Grams, 97 Wis. 2d at 338. Such proof may be less than is sufficient to prove the opposing party's case, but must be substantial and raise genuine issues of material fact. See Leszczynski v. Surges, 30 Wis. 2d 534, 539, 141 N.W.2d 261 (1966).

Here, every fact which the trial court reasoned was not contested was in fact highly contested. For example, Rabideau denied the dogs were involved in a fight prior to the shooting. Rabideau denied her dog was hit on the last shot, noting the dog had in fact been struck by the second of three shots. Rabideau also denied she was on her own property at the time of the shooting, stating that in fact she was immediately adjacent to her dog, in the street and just a few feet away from Officer Jacobi. Finally, Rabideau flatly denied her dog was attacking Officer

Jacobi's dog or otherwise acting in any manner which could be construed as threatening to Officer Jacobi, his wife or his child.

In the face of such contradictions, it is incomprehensible the trial court could simply recite Officer Jacobi's version of events and deem it undisputed. Indeed, it appears that the trial court looked at the facts in the light most favorable to the Defendant, the moving party, which is precisely the opposite of what it is supposed to do. When properly viewed most favorably to Rabideau, the facts establish that Officer Jacobi shot Rabideau's dog without provocation and in the complete absence of any acts which would have caused any fear or concern.

For section 174.01(1) to apply, two circumstances must exist. First, either a person must be threatened with serious bodily harm by the dog or the dog must be on the person's property and threatening his or her domestic animal with serious

bodily harm. Second, the person must have tried other restraining actions and failed or immediate action must be necessary. Because the existence or absence of every one of these circumstances was squarely in dispute, this case should not have been dismissed by pretrial motion.

Nor does it appear that section 174.01(2), WIS. STATS., offers an exemption available to the Defendant. While section 174.01(2) does offer an exemption specifically for law enforcement officers, it is also limited and requires certain factual predicates. First of all, the officer must be acting in the lawful performance of his or her duties. To ask whether Officer Jacobi's performance of his duties was "lawful" merely begs the question. The whole purpose of the lawsuit was to determine whether Officer Jacobi was acting "lawfully." More importantly, the statute required the officer to be acting pursuant to one of the following statutes: section 29.931, section 95.21,

section 174.02(3) or section 174.046(9). None of them, however, apply to this case.

The facts viewed most favorably to Rabideau were that her dog crossed the street to sniff Officer Jacobi's dog. Her dog did not act in any aggressive manner toward Officer Jacobi's dog or family. Nobody, including Officer Jacobi's dog, was threatened with serious bodily harm. Rabideau began crossing the street to retrieve her dog and called to it, prompting it to step off the curb toward her and away from Officer Jacobi and his family and dog. Officer Jacobi shot Rabideau's dog from behind (this was undisputed) and killed it. **Immediate action was not necessary** because the dog was not acting and had not acted in a threatening manner.

That the trial court's rationale cannot withstand review is evident from the fact the appellate court omitted any reference to the trial court's discussion of section 174.02, WIS. STATS.

Instead, the court of appeals focused almost exclusively on the claims for emotional distress. Given that the entire discussion of police privilege was largely ignored by the appellate court, greater scrutiny should have been given to the trial court's finding of frivolousness.

II. IN TORT CASES INVOLVING INFLICTION OF EMOTIONAL DISTRESS, WHETHER NEGLIGENT OR INTENTIONAL, BYSTANDER CLAIMS SHOULD BE VIABLE WHEN THE INJURY IS INFLICTED UPON THE BYSTANDER'S COMPANION DOG.

A. Overview

The question of whether one can recover for the emotional distress of witnessing the death of one's dog implicates this Court's ability to change a policy within its authority. This case presents an opportunity for this Court to recognize that a family's dog is more than mere chattel. This case presents an opportunity for this Court to draw a distinction between an inanimate object such as a house, for which one may have unilateral affection, and a living animal with which one may share mutual affection and have a relationship. There is a tangible difference between the emotional response one experiences when she loses replaceable property which may be

important to her versus witnessing the murder of a dog she cherishes and cannot replace. Wisconsin already has numerous statutes designed to afford special privileges for dogs. See, eg. section 174.02, WIS. STATS. Thus, this Court should change a policy within its authority so that the law better reflects the value system of its constituents.

If it was the economic value of companion animals which is of primary importance to humans, as it is with houses, furniture and other inanimate property, small animal veterinarians would close their doors, because human companions would never bring their companion animals for treatment. Instead, they would abandon them or euthanize them upon any pretext rather than incur the high costs of getting treatment for them. They would obtain newer, younger, and healthier companion animals, who are certainly plentiful. American animal shelters overflow with millions of potential

companion animals who can be had for nearly free. What owner of a worn and broken chair or sofa would not seize the opportunity to replace it with a brand new one for free?

Human companions should be entitled to recover emotional distress damages for the death of their companion animal along the lines of the following syllogism: an overarching principle of tort law is that victims should be compensated for all damages proximately caused by a tortfeasor's wrongful conduct; human companions suffer proximately caused emotional distress and loss of society when their companion animals are wrongfully killed; therefore, owners should be compensated for this emotional distress and loss of society. Steven M. Wise, 4 Animal L. 33, 1998; Debra Squires-Lee, In Defense of Floyd: Appropriately Valuing Companion Animals in Tort, 70 N.Y.U. L. Rev. 1059, 1082 (1995).

The foregoing syllogism also reflects the realities of modern day life in Wisconsin and the United States in general. More than 110 million companion animals reside in more than sixty percent of American households. More than sixty million of these are cats, while more than fifty million dogs reside with more than one-third of all Americans.[2] More Americans share their lives with companion animals than with children.[3] Human companions commonly consider their companion animals as members of their families.[4] Almost one-third of respondents in

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[2] Harold B. Weiss et al., Incidence of Dog Bite Injuries Treated at Emergency Departments, 279 J. Am. Med. Ass'n 51, 53 (1998); Elizabeth C. Hirschman, Consumers and Their Animal Companions, 20 J. Consumer Res. 616, 626 (1994); J.K. Wise et al., Dog and Cat Ownership Soars, 18 Pet Business 22 (1992).

[3] Laurel Lagoni et al., The Human-Animal Bond and Grief 3 (1994); Elizabeth McKey & Karen Payne, APPMA Study: Pet Ownership Soars, 18 Pet Business 22 (1992).

[4] Betty J. Carmack, The Effect on Family Members and Functioning After the Death of a Pet, in Pets and the Family, 149, 150 (Marvin B. Sussman ed. 1985)(citing studies that demonstrate that 70% to 93% of American human companions view their companion animals as

one study of 122 families felt closer to their dog than to any other family member.[5] Dogs also serve special roles for the elderly and the handicapped.

Recent studies show pet owners often feel overwhelming grief when companion animals die. Pet owners' responses to pet loss are often as emotional as the grief responses accompanying the loss of a human friend or family member. In one study, 75 percent of pet owners said that following the death of a pet, they experienced disruptions in their lives and 33 percent of these experienced relationship difficulties so profound they needed time off from work to address their feelings of grief.[6]

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family members).

[5] Sandra B. Barker & Ralph T. Barker, the Human-Canine Bond–Closer than Family Ties? 10 J. Mental Health Counseling 46 (1988).

[6] See e.g. Laurel Lagoni et al., The Human-Animal Bond and Grief 3 (1994).

Courts have already begun to recognize the bond between humans and companion animals. In 1997, the Vermont Supreme court acknowledged that "[l]ike most pets, [the worth of a mixed breed dog] is not primarily financial but emotional; its value derives from the animal's relationship with its human companions." Morgan v. Kroupa, 702 A.2d 630, 633 (Vt. 1997). The Supreme Court of Florida has "hasten[ed] to say that the anguish resulting from the mishandling of the body of a child cannot be equated to the grief from the loss of a dog, but that does not imply that mental suffering from the loss of a pet dog . . . is nothing." LaPorte v. Associated Independents, Inc., 163 So. 2d 267, 269 (Fla. 1964). A Florida District Court of Appeal acknowledged that "anyone who has enjoyed the companionship and affection of a pet will often spend far in excess of any possible market value to maintain or prolong its life." Paul v. Osceola County, 388 So. 2d 40, 40 (Fla. Dist. Ct. App. 1980).

The Minnesota Court of Appeals observed that "[w]hen a pet is lost, its owner frequently cares least about the amount of money it will cost to replace the pet." Soucek v. Banham, 524 N.W.2d 478, 481 (Minn. Ct. App. 1995).

Indeed, it is not surprising that when Rabideau jotted down her small claims complaint, the resultant language focused more on the emotions she experienced rather than what it would cost her to buy a new dog. In examining the complaint, one Texas judge would no doubt urge this Court to "acknowledge that a great number of people in this country today treat their pets as family members. Indeed, to many people, pets are the only family members they have." Bueckner v. Hamel, 886 S.W.2d 368, 378 (Tex. Ct. App. 1994) (Andell, J., concurring). Judge Andell further opined that "[t]he law should reflect society's recognition that animals are sentient and emotive beings that are capable of providing companionship to the

humans with whom they live." Id. See also Meyer v. 4-D Insulation Co., 652 P.2d 852, 854 (Or. Ct. App. 1982).

This Court, in essence, must choose between two paradigms. Under the old paradigm, the bond between humans and companion animals is akin to the "relationship" between the an individual and the pencils, paperclips, etc. he owns. Under the new paradigm, the relationship between humans and companion animals is more akin to a familial relationship. The logical arguments in favor of changing paradigms are compelling. The entire value of companion animals, by definition, by common custom and knowledge, and by legal history resides not in their economic value, but in the mutual love, companionship, and sentiment that exists between human and companion animal. This facet is not present in any species of property. After all, what purpose is there to having a companion animal if not for love, companionship, and sentient?

The "animals as property" syllogism is unacceptably arbitrary, perverse, and unfair because it ignores the commonly understood reality that the relationship between the human companion and the companion animal is no more based upon economic value than is the modern parent-child relationship. Wise, supra at 72. It awards damages for a loss that the owner of a companion animal does not actually suffer (economic value) and refuses to compensate an owner for the damages that an owner actually does suffer (emotional distress and loss of society). Id.

B. The Court Should Extend Liability For Bystander Claims To Include Those Instances Where A Claimant Witnesses The Negligent Destruction Of His Or Her Companion Dog.

Any plaintiff claiming negligent infliction of emotional distress, including a bystander, must prove three elements, that the: (1) defendant's conduct fell below the applicable standard

allowing recovery will not unreasonably burden the defendant or contravene other public policy considerations. First, the injury the victim suffered must have been fatal or severe. Second, the victim and the bystander-plaintiff must be related as spouses, parent-child, grandparent-grandchild, or siblings. Third, the bystander-plaintiff must have observed an extraordinary event, namely the incident and injury or the scene soon after the incident with the injured victim at the scene. Id. at 369-70.

Here, the injury suffered by the victim (i.e., Rabideau's dog) was fatal. In addition, Rabideau observed an "extraordinary event" in that she saw the actual incident and injury from a very close proximity, and did not just come upon the scene after it occurred. This leaves the question of whether the relationship between Rabideau and her dog was a close enough degree of kinship to justify recovery.

Anyone who has owned and loved a pet would agree that in terms of emotional trauma, watching the death of a pet is akin to losing a close relative. Whether or not public policy should be extended to pets is a matter left to the courts. However, the trial court below did not even engage in this type of analysis. Moreover, since the facts were bitterly disputed, this was not the most appropriate of cases to simply "dismiss" a bystander-type claim.

At the appellate court level, the analysis seemed to be overshadowed by the characterization of Rabideau's animal companion as mere chattel, rather than as family. The critical issue, however, should not be whether companion animals are technically "family." Family members should certainly be eligible to recover non-economic damages when they see another family member killed. But "family" is not an end in itself, but merely a means to assure foreseeability and

reasonable limitation of the liability of a negligent tortfeasor. As previously discussed, the bond between companion animals and human companions is sufficiently meaningful to ensure foreseeability and reasonably limits on liability. Hawaii, for one, recognizes the special nature of this bond and permits the recovery of negligently inflicted emotional distress for injury to a companion animal. Campbell v. Animal Quarantine Station, 632 P.2d 1066 (Haw. 1981).

Furthermore, under the facts construed most favorably to Rabideau, Officer Jacobi's actions in this case could fairly be characterized as grossly negligent. Other states have been willing to extend liability when gross negligence is involved. In a pair of veterinary malpractice cases in which veterinarians inflicted severe burns upon the plaintiff's dogs by leaving them on a heating pad for a long period of time, a Florida Court of Appeals permitted the recovery of emotional distress, both when

one dog died from the burns and when one did not. See Johnson v. Wander, 592 So. 2d 1225, 1226 (Fla. Dist. Ct. App. 1992) (dog did not die); Knowles Animal Hosp. v. Wills, 360 So. 2d 37, 38 (Fla. Dist. Ct. App. 1979) cert. denied, 368 So. 2d 1369 (Fla. 1979) (dog died). Other states have held that a human companion may recover damages for the emotional distress that results from the conversion of her companion animal. See e.g., Fredeen v. Stride, 525 P.2d 166, 168 (Or. 1974) (where veterinarian gave plaintiff's dog away after being paid to euthanize him, emotional distress damages are proper if mental suffering is the direct and natural result of the conversion).

Some courts and the Restatement (Second) of Torts deny that fair market value is the proper measure of damages when destroyed property has no market value, or where the value of the destroyed property to the owner is greater then the market value. Landers v. Municipality of Anchorage, 915 P.2d 614, 618

(Alaska 1996). Instead, damages are measured by the actual value of the companion animal to the owner or the animal's intrinsic value. Cf. Daughen v. Fox, 539 A.2d 859, 864 (Pa. Super. Ct. 1988). The Restatement (Second) of Torts states that "[t]he phrase 'value to owner' denotes the existence of factors apart from those entering into exchange value that causes the article to be more desirable to the owner than to others." Restatement (Second) Torts §911 cmt. e (1979).

Recognizing that companion animals can be unique in the way a family heirloom can be unique, some courts have been willing to include sentiment or loss of society in the calculus. See Jankoski v. Preiser Animal Hosp., Ltd., 510 N.E.2d 1084, 1086 (Ill. App. Ct. 1987); Harvey v. Wheeler Transfer & Storage Co., 227 Wis. 36, 277 N.W.2d 627, 629 (1938). While the law of these jurisdictions is not as unfair as the law that restricts recovery to fair market value, it remains anchored in the

erroneous notion that the value of a companion animal is substantially economic.

The market value and value to the owner theories of damages both undermine the common law principle of tort recovery that "when the negligent act of the defendant culminates in damage to person or property, a cause of action is created in the plaintiff, and he may, as an incident to his recovery, have all damages which proximately flow from the violation of his right." Borde v. Hake, 44 Wis. 2d 22, 29, 170 N.W.2d 768 (1969), overruled on other grounds by Heifetz v. Johnson, 61 Wis. 2d 111, 211 N.W.2d 834 (1973). Some jurisdictions carry this principle even further than what is urged here and permit sentimental value to be considered even when the value of inanimate personal property derives primarily from sentiment, as opposed to economics or uniqueness. Landers, 915 P.2d at 619.

The underlying principle is that there should be fair and just compensation for the loss sustained. Where subordinate rules for the measure of damages (fair market value for personal property) run counter to the paramount rule of fair and just compensation, the former must yield to the principle underlying such rules. Campins v. Capels, 461 N.E.2d 712, 720 (Ind. Ct. App. 1984). Campins was "referring to the feelings generated by items of almost purely sentimental value . . . . What we are referring to are those items generally capable of generating sentimental feelings, not just emotions peculiar to the owner." Campins, 461 N.E.2d at 721. Similarly, in Brown v. Frontier Theatres, Inc., 369 S.W.2d 299 (Tex. 1963), the Supreme Court of Texas said that the usual rule denying recovery for sentimental value for the loss of property is not the rule to be applied in a suit to recover for the loss or destruction of items which have their primary value in sentiment.

The court of appeals decided Rabideau could not recover because she was not related to the dog and because the dog was merely property. To support this decision, the appellate court noted that this Court has held it unlikely that a plaintiff could ever recover for the emotional distress caused by negligent damage to her property. Kleinke v. Farmers Coop. Supply & Shipping, 202 Wis. 2d 138, 145, 549 N.W.2d 714 (1996). The Kleinke case involved the loss of a couple's home which became uninhabitable after an oil company pumped 300 gallons of oil into their basement after an oil tank was removed from the home and the pipe left uncapped. Because the loss involved property, the Kleinke court held the homeowners could not recover for negligent infliction of emotional distress. The Kleinke court stated that having one's property damaged is not nearly as devastating as witnessing or being involved in the loss of a close relative. The court further stated that such types of

distress are not compensated because they are life experiences that all unfortunately may expect to endure. Kleinke at p. 145. Thus, the appellate court equated the death of Rabideau's dog with the ruin of the Kleinke's home.

This Court has stated that public policy considerations may preclude liability when it would shock the conscience of society to impose liability. Bowen Lumbermans Mut. Cas. Co., 183 Wis. 2d 627, 656, 517 N.W.2d 432 (1994). The commonly cited public policy criteria are:

> (1) Whether the injury is too remote from the negligence;
>
> (2) Whether the injury is wholly out of proportion to the culpability of the negligent tortfeasor;
>
> (3) Whether in retrospect it appears extraordinary that the negligence should have brought about the harm;

(4) Whether allowance of recovery would place an unreasonable burden on the negligent tortfeasor;

(5) Whether allowance of recovery would be too likely to open the way to fraudulent claims;

(6) Whether allowance of recovery would enter a field that had no sensible or just stopping point.

Id. Relying upon four of the six Bowen public policy considerations, the Kleinke court concluded that it was "unlikely that a plaintiff could ever recover for the emotional distress caused by negligent damage to his or her property." Id. at 716.

But Kleinke rightly did not bolt the door to claims for emotional distress to every kind of property under every circumstance. While it might have seemed "unlikely" that plaintiffs should be compensated for emotional distress for property damage, emotional distress damages for the negligent killing of a companion animal should not be precluded. As has

been demonstrated, a companion animal is a unique species of property that can both form intense relationships with plaintiffs and be killed.

The first and third Bowen public policy criteria have little relevance to the issue at hand. The second Bowen public policy criterion is "whether the injury is wholly our of proportion to the culpability of the negligent tortfeasor." For example, in Babic v. Waukesha Mem'l Hosp., Inc., 205 Wis. 2d 698, 556 N.W.2d 144 (Ct. App. 1996), the severe emotional distress that afflicted a plaintiff who feared contamination with HIV after being stuck by a syringe left in clean hospital linens was out of proportion to the defendant's culpability when the chance of having contracted the virus under that circumstance was extremely minimal. Babic, 205 Wis. 2d at 707. And in the case of the wrongful deaths of such non-human animals as livestock and mink raised for pelts, the value of which to their

owners is wholly economic, Bowen's disproportionality criterion would undoubtedly apply. "[E]motional distress based on property damage is the type of injury that will usually be wholly out of proportion to the culpability of the negligent party." Kleinke, 202 Wis. 2d at 145. But, as the cited studies demonstrate, a negligent killing of a companion animal does not cause the usual kind of damage. The damages it causes are unique.

More than twenty-five years ago, this Court, in allowing an action by parents for loss of society against a tortfeasor who negligently injured their child, confronted a roughly analogous situation. In that case, Shockley v. Prier, 66 Wis. 2d 394, 225 N.W.2d 495 (1975), this Court rejected the anachronistic reasoning put forth by the Rhode Island Supreme Court in McGarr v. National & Providence Worsted Mills, 24 R.I. 447, 53 Atl. 320 (1902), that, as between a parent and child, "[i]t is

therefore practically a business and commercial question only, and the elements of affection and sentiment have no place therein." McGarr, 53 Atl. at 326. At the same time, this Court embraced the recent statement of the Washington Supreme Court in Lockhart v. Besel, 426 P.2d 605 (1967), that, to limit a parent's damages to "the pecuniary value of the loss of a minor child's services," was "a pure fiction." Lockhart, 426 P.2d at 609.

The analogy between a companion animal and a child need not be exact to be persuasive. The cited studies demonstrate that the relationship between a human companion and his companion animal contains no more of the elements of a "business and commercial" relationship than does the relationship between parent and child. Unlike the relationship between humans and inanimate objects, or even such animate property as livestock, both the parent/child relationship and the

relationship between humans and companion animals are "bi-directional." They "bring a significant benefit to a central aspect of the lives of each, which is in some sense voluntary," while "each party treat[s] the other as something entitled to respect and benefit in its own right, but also as an object of admiration, trust, devotion, or love." Jerrold Tennenbaum, Veterinary Ethics 125 (1989).

The cited studies also demonstrate that the relationship between humans and companion animals is so analogous to that of a human family relationship, especially of parent and child, that the judicial award of compensation for its negligent destruction would not shock the conscience of society. Quite the contrary. Society would more likely expect that the relationship between humans and companion animals would not be exempted from the fundamental tort principle that mandates fair compensation for all damages that proximately flow from the

violation of one's right. The emotional distress that a human companion suffers from the negligently caused death of her companion animal is no more a "life experience that all may be expected to endure," than would be the negligently caused death or serious injury of any family member. Kleinke at 145.

The fifth Bowen public policy criterion is "whether allowance of recovery would be too likely to open the way to fraudulent claims." In Kleinke, this Court stated that "[t]he greater a plaintiff's attachment or sentimental feeling toward the property in question, the greater his or her claim for damages could be. To determine when such an attachment is real and which it is false, and to determine how significant the attachment is, would be difficult, if not impossible. Every plaintiff in a negligent property damage case would be encouraged to claim an extreme emotional attachment to the damaged property." Kleinke at 146.

This public policy criterion has little applicability to the issue of whether the human companion of a companion animal killed should be able to recover non-economic damages. A court will have no more difficulty in determining whether an attachment between humans and companion animals is genuine than it would have in determining whether any other family attachment is genuine. Wise, supra. Companion animals normally participate in a living bi-directional relationship with their human companions. Id. Their value to their human companions resides wholly in this relationship. Id. The chances of a human companion fraudulently claiming a strong emotional attachment under these circumstances is therefore low. Id.

The sixth Bowen public policy criterion is "whether allowance of recovery would enter a field that had no sensible or just stopping point." In Kleinke, the Court said that "'[e]ach and every plaintiff in any property damage claim could assert an

emotional distress claim based not on the effect of the incident itself but on how their lives have changed since the underlying incident. Such an allowance could open the way to recovery for stress incurred by any amount of damage to any type of property." Kleinke at 146. But, unlike a claim for emotional stress for the loss of "any type of property," a logical stopping place for liability exists. A logical stopping place would be to limit liability to the human companion of a companion animal who is killed. Cf. Garrett, By Kravit v. City of New Berlin, 122 Wis. 2d 233, 238, 362 N.W.2d 137 (1985).

C. Under The Facts Most Favorable To Rabideau, The Intentional Killing Of Her Animal Companion Was Extreme And Outrageous And Caused An Extreme Disabling Emotional Response.

A disturbing aspect of the appellate court's decision is how it rationalized foreclosing Rabideau's claim for intentional infliction of emotional distress. The appellate court correctly noted that in such a case a plaintiff must establish four factors:

> (1) the defendant's conduct was intentional;
>
> (2) the defendant's conduct was extreme and outrageous;
>
> (3) the defendant's conduct was the cause-in-fact of the plaintiff's injury; and
>
> (4) the plaintiff suffered an extreme disabling emotional response to the defendant's conduct.

Alsteen v. Gehl, 21 Wis. 2d 349, 359, 124 Wis. 2d 312 (1963). The appellate court conceded the causation issue but reasoned that Rabideau could not establish the other three factors.

The appellate court's reasoning on whether the defendant's conduct was intentional merits review because while it tacitly concedes the destruction of the dog was intentional, it held that Rabideau could not show that Officer Jacobi intended to harm *her*. The first Alsteen factor, however, does not require that the act be taken with the intent of causing the specific harm which results. Rather, it is enough that the act itself be intentional, as opposed to accidental. Because in this case the act was clearly intentional, this Court should clarify this distinction lest all such claims become barred simply because a plaintiff cannot prove that an outrageous act was performed with the specific intent of causing harm to the plaintiff. Indeed, under this theory, a woman whose baby is shot and killed while in her arms would have no cause of action against the perpetrator if he shot the baby just for the sport of it rather than because he wanted to inflict emotional distress upon the woman.

Even more distressing is the appellate court's reasoning on the second Alsteen factor:

> Second, in this case Jacobi did not act extremely or outrageously by shooting Rabideau's dog. We must assume that Rabideau's version of the facts is true and that Rabideau's dog was merely sniffing Jacobi's dog. This being so, Jacobi's act of shooting Rabideau's dog was unreasonable but not extreme or outrageous.

Appendix, page 107. If an individual walks up and kills another family's dog simply because it is sniffing his own dog, it is difficult to see how such an action is merely unreasonable. Such an action is, in fact, outrageous and moreover, should be deemed an assault on Rabideau herself, who was standing right next to the dog.

The Supreme Court of Alaska and the Idaho Court of Appeals have held that the relationship between a companion animal and her human companion is sufficiently close to permit recovery of damages for intentional infliction of emotional distress. Croft by Croft v. Wicker. 737 P.2d 792 (Alaska 1987);

Richardson v. Fairbanks North Star Borough, 705 P.2d 454, 456 (Alaska 1985); Gill v. Brown, 695 P.2d 1276, 1277-78 (Idaho Ct. App. 1985). The Supreme Court of Tennessee has held that the threat by a veterinarian to kill a dog because of unpaid fees suffices for intentional infliction of emotional distress. Lawrence v. Stanford, 655 S.W.2d 927 (Tenn. 1983).

Moreover, it has been generally, albeit not universally, recognized that where a defendant commits a willful tort, compensatory damages for that mental disturbance and its physical consequences may be awarded. This is especially true when the tort is committed with malice or ill-will and it might reasonably be expected to lead to considerable mental disturbance of the plaintiff. This is sometimes true even when, aside from the property damage, no independent cause of action

would have arisen.[7] The intentional character of the tortfeasor's conduct alone is said to assure the genuineness of any claimed emotional distress. See e.g. Bowen Lumbermans Mut. Cas. Co., 183 Wis. 2d 627, 642, 517 N.W.2d 432 (1994) (discussing the tort of intentional infliction of emotional distress, the court noted that the "outrageous conduct itself could serve to authenticate the plaintiff's emotional distress"). Accordingly, the malicious or intentional destruction of a companion animal has often justified the award of emotional distress damages. See e.g., La Porte, 163 So. 2d at 269 (Fla. 1964) (killing of dog by hurling garbage can was malicious and demonstrated extreme indifference to plaintiff's rights). Under the facts most favorable to Rabideau, a jury could have easily concluded that Officer

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[7] W.E. Shipley, Annotation, Recovery for Mental Shock or Distress in Connection with Injury to or Interference with Tangible Property, 28 A.L.R. 2d 1070, 1077, 1089-90 (1953).

Jacobi's act of shooting the dog was committed with malice and ill-will.

III. THE SMALL CLAIMS COMPLAINT WAS NOT FRIVOLOUS AND THE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED BECAUSE AT A MINIMUM, A LIBERAL CONSTRUCTION OF THE COMPLAINT SET FORTH A CLAIM FOR PROPERTY LOSS.

Section 814.025(3)(b), WIS. STATS., allows for sanctions when:

> The party or the party's attorney knew, or should have known, that the action, special proceeding, counterclaim, defense or cross complaint was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

Thus, the trial court did not conclude the complaint was filed in bad faith. Instead, the trial court concluded there was no basis in law for the complaint.

Whether the claims advanced by Rabideau were frivolous is a mixed question of law and fact. Atkinson v. Mentzel, 211 Wis. 2d 628, 556 N.W.2d 158 (Ct. App. 1997). What an attorney knew or reasonably should have known presents a

question of fact. See Stern v. Thompson & Coates, Ltd., 185 Wis. 2d 220, 241, 517 N.W.2d 658 (1994). However, whether that factual determination constitutes frivolousness within the meaning of §814.025(3)(b), WIS. STATS., is a question of law this court reviews independently. Id.. Because frivolousness exists only when no reasonable basis exists for a claim, all doubts must be resolved in favor of the attorney. Swartwout v. Bilsie, 100 Wis. 2d 342, 350, 302 N.W.2d 508 (Ct. App. 1981).

The trial court erred when it concluded there was no reasonable basis in law upon which Ms. Rabideau could have recovered damages in this case. The trial court's perception of this case was highly skewed by its belief that Officer Jacobi's version of events was undisputed. As such, it is not surprising the trial court held the claim frivolous. Ms. Rabideau alleged that in killing her dog, Thomas Jacobi had committed a tort.

The elements of a tort are:

(1) duty;

(2) breach;

(3) causation; and

(4) injury.

Associates Fin. Services Co. v. Hornik, 114 Wis.2d 163, 167, 336 N.W.2d 395 (Ct. App. 1983), citing Anderson v. Green Bay & Western Railroad, 99 Wis.2d 514, 516, 299 N.W.2d 615 (Ct. App. 1980). Thus, there was a reasonable basis in the "law" for recovery if there were facts to support these elements.

Here, there were facts which could have established each of these elements. First, section 174.01 establishes that Officer Jacobi had a duty to use restraint and not kill her dog unless there was a threat of serious bodily harm by the dog and other restraining actions were tried and failed; or immediate action was necessary. Second, the testimony of Rabideau would

establish that Officer Jacobi breached that duty because there was no threat of harm at all, no need for immediate action, nor any other restraining action tried and yet, Officer Jacobi shot and killed her dog anyway. Third and fourth, the facts would establish at a very minimum that the breach "caused" Ms. Rabideau to lose her dog, said loss of property constituting an "injury." Finally, the trial court found Officer Jacobi was acting as a police officer when he killed Rabideau's dog.

In concluding that Rabideau's complaint was frivolous, the trial court seemed to have a problem with the amount of damages Rabideau alleged, rather than the legal sufficiency of the complaint. The trial court seemed to focus almost entirely upon Rabideau's claim for emotional distress. Rabideau, however, had also lost a dog which, at a bare minimum, constitutes property under Wisconsin law. Hagenau v. Millard, 182 Wis. 544, 548, 195 N.W. 718 (1924). See also Campenni v. Walrath, 180 Wis. 2d 548, 560, 509 N.W.2d 725 (1994). Even

if Rabideau was unable to recover for emotional distress, this does not mean her complaint was insufficient and that she could recover nothing. Her complaint was supposed to be liberally construed at this stage of the proceedings. Hermann v. Town of Delavan, 215 Wis. 2d 370, 378, 572 N.W.2d 855 (1998). Under such a liberal construction, the complaint, which clearly alleges her dog had been killed, alleges the loss of property. For this reason alone, the complaint should not have been dismissed or held frivolous.

On a motion for summary judgment or a motion to dismiss, pleadings are to be construed liberally and a claim will be dismissed only if it is quite clear that under no conditions can the plaintiff recover. See, eg. Grams, 97 Wis.2d at 339.; Morgan v. Pennsylvania General Ins. Co., 87 Wis. 2d 723, 731, 275 N.W.2d 660 (1979); Town of Eagle v. Christensen, 191 Wis.2d 301, 311, 529 N.W.2d 245, 249 (Ct. App. 1995). In the present case, Rabideau's pleading stated that "City of Racine Police

Officer Thomas Jacobi shot and killed my dog, Dakota, and caused me to collapse and require medical attention." The appellate court conceded Rabideau would have a cause of action for the loss of property but reasoned that she failed to specifically plead for "the lost property value of her dog as part of her actual damages." Therefore, the appellate court refused to construe her complaint as one for damage to property.

The decision of the appellate court is at odds with the decisions which call for a liberal reading of the pleadings. Rabideau's complaint stated that the officer killed her dog "and" caused her emotional distress, not that he killed her dog "which" caused her emotional distress. A truly liberal construction of the complaint would have recognized that Rabideau was complaining that her dog was lost (i.e., dead) and that in addition, she suffered emotional distress as a result. To read Rabideau's complaint as not involving the loss of property simply because she did not identify her dog as "property" is to

give the complaint a rather strict, as opposed to a liberal, reading.

The appellate court decision is also internally inconsistent on this point. It is incredible that the appellate court denied Rabideau any claim for emotional distress because a dog is so obviously property and yet refused to construe her complaint as stating a claim for property damage because she did not specify the obvious. If the law establishes that a dog is property, then a factual statement that one has had her dog killed should be sufficient to establish a claim for property loss, especially if pleadings are to be liberally construed.

The fact that Rabideau did not use the magic words "lost property value" only serves to reaffirm that people do not view their dogs as property, but instead, as members of the family. Nevertheless, this Court should not let the appellate court have it both ways. If a dog is, by definition, property, then a liberal reading of a complaint which alleges that one's dog has been

destroyed should be understood as a claim that one's property has been destroyed. This should not change simply because the person adds "*and caused me to collapse and require medical attention,*" particularly when the pleading is an informal small claims complaint. Here, the fact that the appellate court recognized that there were conditions under which Rabideau could have recovered, even if it was inartfully pleaded, was proof in and of itself that a viable cause of action lie within the complaint.

At a minimum, Rabideau's complaint should not have been deemed frivolous under these circumstances. It cannot be said that Rabideau's claim was without a reasonable basis in law or equity. Even if her claim for emotional distress was determined to be without merit, she still had a claim for her property loss. The appellate court, however, merely affirmed the lower court's finding of frivolousness without discussion. This

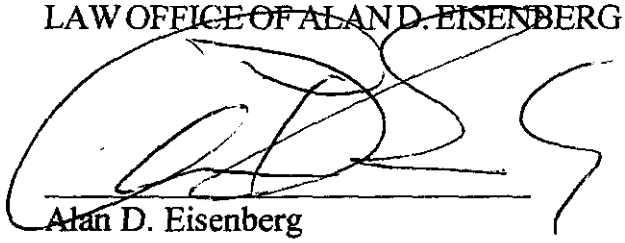
Court should reverse this holding as it came without any reasoning to support it.

CONCLUSION

For all of the reasons set forth in this brief, the Petitioner asks this Court to vacate the order dismissing the cause of action and sanctioning the Petitioner's attorney and remand for further proceedings.

Dated this 15th day of November, 2000.

LAW OFFICE OF ALAN D. EISENBERG



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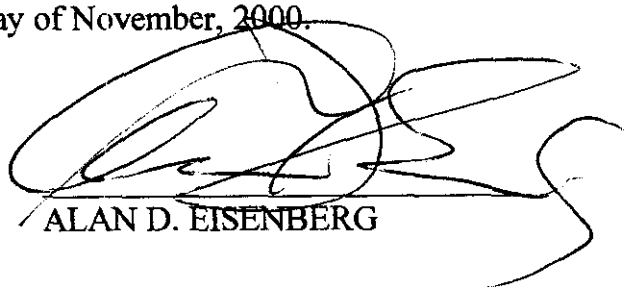
CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced using a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, minimum 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text.; double-spaced. The length of this brief is 9461 words.

Dated this 15th day of November, 2000.



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